

**CMS Life Ins. Opportunity Fund, L.P. v Progressive
Capital Solutions, LLC**

2014 NY Slip Op 30592(U)

March 6, 2014

Supreme Court, New York County

Docket Number: 653646/2011

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, J.S.C.

CMS LIFE INSURANCE OPPORTUNITY FUND,
 L.P., CNF II PARTNERS, GENESIS MERCHANT
 PARTNERS, LP and GENESIS MERCHANT
 PARTNERS II, LP,

Plaintiffs,

- against -

PROGRESSIVE CAPITAL SOLUTIONS, LLC,
 JOHN PUGLISI, BASTION PARTNERS, LLC,
 EDWARD DURAN, EUGENE WEISS, and PAUL
 BIKO,

Defendants.

Index No.: 653646/2011

Motion Seqs. 025, 027

DECISION/ORDER

In this investor fraud action, Ironshore Specialty Insurance Company (Ironshore) moves to intervene as the insurer of defendant Progressive Capital Solutions, LLC (Progressive) and to vacate the default judgment entered against Progressive on liability. By separate motion, plaintiffs CMS Life Insurance Opportunity Fund, L.P. (CMS) and CNF II Partners (CNF) move to amend the Stipulation and Order for the Production and Exchange of Confidential Information dated February 17, 2012, governing the dissemination of documents and other material produced in this action (Confidentiality Order).

The facts relevant to these motions are undisputed. Ironshore issued a Miscellaneous Professional Insurance Policy, dated December 2, 2011, providing coverage for Progressive and its officers and directors, including defendants Edward Duran, Eugene Weiss, and Paul Biko. (Aff. of Edward Copeland, dated Aug. 22, 2013 [Copeland Aff.], Ex. 18 [Policy].) CMS initiated this action by filing a summons and complaint on December 29, 2011, and amended the complaint to add CNF as a plaintiff on January 9, 2012. (Id., ¶¶ 3, 5; Ex. 1 [Verified Complaint]);

Ex. 2 [Amended Verified Complaint].) Lawrence Goldberg, Esq. appeared as counsel for defendants John Puglisi and Progressive on January 23, 2012, at the latest, when he served and filed opposition papers to plaintiffs' motion for a preliminary injunction. Ironshore denied coverage regarding the initial complaint, by letter dated January 30, 2012. (Id., Ex. 12 [CMS Letter dated June 14, 2013], Ex. 13 [Letter by Ironshore counsel dated July 18, 2013].)

Plaintiffs filed the operative second amended complaint, which was not verified, on January 4, 2013. (Id., Ex. 4.) In this complaint, plaintiffs assert a single cause of action against Progressive for "negligence/negligent supervision" of Puglisi. (SAC, ¶¶ 75-83.) Although Ironshore claims that Progressive did not provide Ironshore with notice of the second amended complaint or "request[] that Ironshore defend" it, Ironshore acknowledges that "the former managing members [of Progressive] have reported the matter to Ironshore and Ironshore has received certain correspondence regarding the [second amended complaint] from [CMS's] counsel." (Copeland Aff., Ex. 13.)

By order to show cause dated February 5, 2013 and returnable on February 28, 2013, Goldberg moved to be relieved as counsel to both Puglisi and Progressive. On February 7, 2013, before his motion was heard and while still counsel to Puglisi and Progressive, Goldberg served and filed an answer to the second amended complaint on behalf of Puglisi, but not Progressive. (Id., Ex. 7 [Answer].) The court granted Goldberg's motion to be relieved, without opposition, by order dated March 5, 2013, which stayed any further proceedings against Puglisi and Progressive for a period of thirty days from the date of that order "except to the extent set forth in the transcript of the proceedings on February 28, 2013." (Id., Ex. 15.) During the proceedings on February 28, 2013, CMS sought permission to move for a default judgment against

Progressive and another defendant, Bastion Partners, LLC (Bastion), during the stay due to Goldberg's alleged two-month delay in bringing his motion to withdraw. (Feb. 28, 2013 Tr. at 7-10.) The court granted CMS leave to move for a default judgment against Progressive and Bastion during the period of the stay, but directed that Progressive and Bastion were to have a full 30 days to obtain counsel and another two weeks beyond that to oppose the motion for a default judgment. (Id. at 10.)

CMS moved for a default judgment against Progressive and Bastion for failure to answer the second amended complaint by order to show cause presented on April 9, 2013. The court heard the motion on May 30, 2013. Neither Progressive nor Bastion appeared, and no party interposed a substantive objection to the motion. (May 30, 2013 Tr. at 5-11.) The court noted the absence of a verified complaint or an affidavit of merit in support of CMS's motion and afforded CMS until June 10, 2013 to file a supplemental affidavit. (Id. at 5-6, 34.) After CMS filed the supplemental affidavit, by order dated June 12, 2013, the court granted the motion to the extent of granting judgment by default as to liability on the first cause of action for conversion against Bastion and on the third cause of action for negligence/negligent supervision against Progressive, and referring the determination of damages to a Special Referee. An inquest on damages was scheduled for September 17, 2013. (Copeland Aff., Ex. 11.)

Apparently unaware of the June 12, 2013 order, CMS notified Ironshore, by letter dated June 14, 2013, that a motion for a default judgment against Progressive and Bastion was then pending and that CMS also intended to seek default judgments against defendants Biko and Duran. (Id., Ex. 12.) By letter dated June 21, 2013, CMS sent Ironshore a copy of this court's June 12 order. (Aff. of Edward Copeland, dated Oct. 4, 2013, ¶ 24; Aff. of Judd Serotta, dated Sept. 13, 2013 [Serotta Aff.], Ex. 13.) According to Ironshore, it then attempted but was unable

to locate anyone with authority to speak on behalf of Progressive. (Copeland Aff., ¶¶ 51-54.) On August 6 and 9, 2013, Ironshore asked plaintiffs whether they would consent to Ironshore's intervention and vacatur of the default, and both CMS and CNF declined. (Copeland Aff., ¶¶ 55-57.) Ironshore moved to intervene and to vacate the default judgment by order to show cause presented on August 23, 2013.

Intervention

Ironshore seeks to intervene and to defend the action on behalf of Progressive. (Dec. 10, 2013 Tr. at 4-5.) In opposition, plaintiffs contend that Ironshore's motion to intervene is untimely and that the delay "will set Plaintiffs back many months" in obtaining a judgment. (Memo. In Opp. at 6.) Pursuant to CPLR 1012 (a) (2), upon a timely motion, a party may intervene as of right "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR 1013 allows for permissive intervention, upon a timely motion, "when the person's claim or defense and the main action have a common question of law or fact." Generally, "[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." (Yuppie Puppy Pet Products, Inc. v Street Smart Realty, LLC, 77 AD3d 197, 201 [1st Dept 2010]. See also Global Team Vernon, LLC v Vernon Realty Holding, LLC, 93 AD3d 819, 820 [2d Dept 2012].) The timeliness of a motion to intervene is determined not by "mere mechanical measurements of time, but [by] consider[ing] whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." (Yuppie Puppy Pet Products, Inc., 77 AD 3d at 201. See also ABM Resources Corp. v Doraben, Inc., 89 AD3d 773, 774 [2d Dept 2011]; Halstead v Dolphy, 70 AD3d 639, 640 [2d Dept 2010].)

Ironshore's motion is timely. Progressive was represented by counsel until the court's

March 5, 2013 order granted leave to its counsel to withdraw. Significantly, plaintiffs do not allege that Ironshore had notice of Goldberg's withdrawal or of the motion for a default judgment before CMS's June 14, 2013 letter. Ironshore moved to intervene approximately two months after that letter and after first determining that it could not locate an individual with the authority to speak for its insured Progressive, and that the intervention and vacatur could not be resolved without motion practice.

Further, this action is far from its ultimate resolution. Although CMS has been awarded a default judgment, the judgment is limited to liability and is only against two of the six defendants. With the exception of Eugene Weiss, the remaining five defendants continue to defend the action. The inquest on damages has not yet been held, and the action is not trial ready with respect to the remaining defendants. Nor have plaintiffs demonstrated prejudice. As discovery is ongoing, Ironshore's intervention will not cause undue delay. Moreover, any prejudice to plaintiffs can and will be limited by preventing Ironshore from repeating any discovery that was conducted during the period that Progressive was represented by counsel.

As discussed further below in connection with the branch of Ironshore's motion to vacate the default judgment, it cannot be seriously argued that Ironshore is not an interested party. Moreover, Ironshore seeks only to assert defenses on behalf of Progressive and not to raise any independent claims on its own behalf. Ironshore's motion to intervene on behalf of Progressive will therefore be granted.

Vacatur of the Default

CPLR 5015 (a) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person" An insurer of a party may be an interested person within the meaning of CPLR 5015 (a). (See

Harkless v Reid, 23 AD3d 622 [2d Dept 2005]; Halali v Vista Env'tls., Inc., 8 AD3d 435 [2d Dept 2004].) Indeed, as no one has come forward with the authority to speak for Progressive and to retain counsel on its behalf, Ironshore would seem to be the only person with an interest in vacating the default judgment. (Bond v Giebel, 101 AD3d 1340, 1342 [3rd Dept 2012], lv dismissed 21 NY3d 884 [2013]; see also Lane v Lane, 175 AD2d 103, 105 [2d Dept 1991].)

Ironshore first contends that the default judgment against Progressive should be vacated, pursuant to CPLR 5015 (a) (3), based on misconduct. Ironshore's claim of misconduct is premised on plaintiffs' agreement with defendant Duran, Progressive's former Managing Member, that any judgment they obtain against him will be paid from applicable liability insurance proceeds. (Copeland Aff., Ex. 17 [Consent Order].) Duran has not deliberately defaulted but, rather, continues to defend this action. The court therefore does not find collusive conduct of the type that has been held to constitute misconduct within the meaning of CPLR 5015 (a) (3). (See Bond v Giebel, 101 AD3d 1340, supra.) However, Duran does not have the same incentive to vigorously defend this action that he had before the agreement was made. The court accordingly holds that vacatur of the default judgment is warranted in the interests of justice. (See id. at 1343.)

Ironshore alternatively contends that the default judgment should be vacated based on its showing of a reasonable excuse for the default and a meritorious defense. (Theatre Row Phase II Assocs. v H & I, Inc., 27 AD3d 216, 216 [1st Dept 2006]; Navarro v A. Trenkman Estate, Inc., 279 AD2d 257 [1st Dept 2001].) "[I]t is within the sound discretion of the motion court to determine whether the proffered excuse and the statement of merits are sufficient." (Navarro, 279 AD2d at 258.) The excuse for the default is reasonable for the same reasons that Ironshore's motion to intervene is timely. With respect to the merits of a defense by Progressive to this

action, Ironshore correctly argues that a principal is not ordinarily liable for the acts of an independent contractor – here, Puglisi or Bastion – but that an exception to this general rule exists where the principal is negligent in selecting, instructing, or supervising the contractor. (See Kleeman v Rheingold, 81 NY2d 270, 274 [1993].) In order to prevail under this exception, however, plaintiffs will be required to show that Progressive knew or should have known of a propensity on Puglisi’s part to commit the alleged misconduct – i.e., the conversion of funds. (See generally Doe v Goldweber, 112 AD3d 446, 447 [1st Dept 2013].) As Ironshore also correctly points out, the evidence in the record bearing on this highly fact-specific issue is equivocal. (See e.g. Aff. of David Clapper [CMS’s CFO], ¶ 26 [asserting in wholly conclusory fashion that Progressive engaged Puglisi through Bastion because of his “untrustworthy background”]; Duran Dep. at 56-57 [attesting vaguely that Puglisi had a “mark on his license”].) An issue also exists as to the basis for CMS’s maintenance of its own claim against Progressive given, as alleged in the complaint (SAC ¶ 20) that CNF retained Progressive (which then retained Puglisi). The court accordingly holds that Ironshore’s showing is sufficient to support vacatur of the default judgment.

Amendment of the Confidentiality Order

Plaintiffs allege, and no party disputes, that Progressive designated as “confidential” all documents that it produced, and Puglisi and Duran designated their entire deposition transcripts as “confidential.” (Aff. of Judd Serotta, dated Nov. 13, 2014, ¶ 11; Ex. B [Goldberg email dated Feb. 3, 2012].) Plaintiffs contend that they are obligated to produce those documents in another action pending in New Jersey where they sued Progressive’s accountants for malpractice in not uncovering the alleged fraud. (Serotta Aff., dated Nov. 13, 2014, ¶¶ 2, 4, 16.) Plaintiffs now move to amend that Confidentiality Order to allow that production subject to the confidentiality

order in the New Jersey action. Ironshore and defendants Duran and Biko oppose the motion, contending that the documents contain, among other things, individual health and medical records and that their re-production in the New Jersey litigation would implicate privacy and confidentiality concerns. (Aff. of Edward Duran, ¶¶ 7, 11; Memo. In Opp. at 6; Dec. 10, 2013 Tr. at 33-34.)

Plaintiffs acknowledge that when Progressive produced the documents, it gave plaintiffs access to Progressive's servers and permitted CMS to copy the contents wholesale. It thus appears that Progressive never reviewed the documents for relevance, privilege, privacy concerns, or confidentiality. (Dec. 10, 2013 Tr. At 31-32, 35-37.) In moving for an amendment of the Confidentiality Order, plaintiffs argue that they should not now be required to review the documents. The court need not determine the parties' respective obligations to review the Progressive production, as Ironshore's intervention renders this issue moot. By letter dated December 18, 2013, Ironshore agreed that if permitted to intervene, it would "review the relevant documents for confidentiality and privacy concerns." Accordingly, plaintiffs' motion to amend will be denied without prejudice to plaintiffs' right to move for appropriate relief if, after Ironshore makes the production on behalf of Progressive, there are disputes as to confidentiality designations that the parties cannot resolve after meeting and conferring. In addition, Puglisi and Duran, who previously designated their entire depositions as confidential, will be directed to review the depositions and to make designations, if any, pursuant to the Confidentiality Order.

Accordingly, it is hereby ORDERED that Ironshore's motion to intervene is granted to that extent that Ironshore shall be permitted to intervene in this action on behalf of Progressive; and it is further

ORDERED that Ironshore's motion to vacate the default judgment as to Progressive is

granted on condition that Ironshore serve and file an answer to the complaint herein, or otherwise respond thereto, within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the Ironshore shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office, who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the reference of an inquest on damages contained in the June 12, 2013 order is vacated; and it is further

ORDERED that a copy of this order with notice of entry shall be served by plaintiffs on the Clerk of the Special Referee's Office (Room 119) forthwith; and it is further

ORDERED that plaintiffs' motion to amend the Confidentiality Order is denied without prejudice; and it is further

ORDERED that Ironshore shall, within 90 days of the date of entry of this order, review all documents previously produced by Progressive and make designations, if any, pursuant to the Confidentiality Order; and it is further

ORDERED that defendants Duran and Puglisi shall review their depositions, within 30 days of the date of entry of this order, and make designations, if any, pursuant to the Confidentiality Order; and it is further

ORDERED that the parties are directed to appear for a status conference in Room 248, 60 Centre Street, New York, New York on May 1, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
March 6, 2014


MARCYS. FRIEDMAN, J.S.C.