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Insurance Office Failure: Reasonable Excuse for Default?

It is well-established that a defendant seeking to vacate a default in appearing or answering a complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action.[1]

It is equally well-settled that the determination of what constitutes a reasonable excuse lies within the sound discretion of the court,[2] and that it is within the sound discretion of the court, in the interests of justice, to excuse delay or default resulting from "law office failure."[3]

While it has been held that CPLR 2005 was not intended routinely to excuse defaults due to law office failures,[4] and that "[b]ald assertions of law office failure will not serve to routinely excuse defaults,"[5] that statute has been used effectively to excuse defaults in a variety of circumstances involving isolated and inadvertent incidents of neglect by counsel, which the courts feel should not deprive a party of his or her day in court.[6]

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CPLR 2005 specifically refers to "law office failure," but, notably, does not in any way reference "insurance company failure," i.e., situations where it is claimed that the delay or default in answering a complaint is attributable not to the neglect of the attorney assigned by the insurer to defend the action, but, rather, to the neglect of the insurer itself. The most common example of such insurer neglect is its failure timely to forward the complaint to counsel to defend. No statute has yet been enacted specifically to address "insurance office failure."

Prior Decisions

Although it appears that the Appellate Division, Third Department has generally likened "insurance company failure," or, as that court puts it, "in-house problems of defendant's insurer," to "law office failure" and, accordingly, deferred to the discretion of the trial court reviewing a motion to vacate a default based upon such a failure,[7] the Appellate Division, Second Department has consistently and repeatedly, over the past two and one-half decades, held that an insurance carrier's delay is insufficient to establish a reasonable excuse for a default.[8]

Indeed, it has been suggested that it is not unreasonable to refuse to vacate a default judgment obtained against the insureds due to the neglect of their insurer because, in reality, the insurer is the real party in interest[9] and will ultimately be responsible for the payment of the final judgment pursuant to Insurance Law §3420(a)(2).

'Harcztark'

Just over a year ago, in *Harcztark v. Drive Variety, Inc.*, 21 AD3d 876 (2d Dept. 2005), the Second Department revisited the issue of "insurance company failure" and held (over a lengthy and vigorous dissent by Justice Stephen Crane), that the court's prior decisions on the issue should not be read to hold "that delay by an insurance company may *never* constitute *all* or part of a reasonable excuse by an insured for a default" [emphasis added]. Furthermore, the majority added that "we find no basis to categorically exclude consideration of a delay by an insurance company in making such a determination [as to whether there was a reasonable excuse for a default]."[10]

The pertinent facts of that case (spelled out in the dissenting opinion) were that the plaintiff's trip-and-fall action was filed on Feb. 21, 2003 and the summons and complaint were served on Feb. 27, 2003. It was not until May 2, 2003, more than two months after service was effected, however, that the summons and complaint were forwarded to defense counsel. And, it was not until June 10, 2003 that the defendant's answer was interposed. Plaintiff's counsel rejected this untimely answer. In moving, by order to show cause dated July 15, 2003, to vacate their default, the defendants proffered the excuse that the summons and complaint left in their store in February 2003 were forwarded [presumably promptly] to the insurance carrier "with the understanding that they would interpose an answer on my [sic] behalf."

On these facts, the majority affirmed the grant of the defendant's motion to vacate its default, and allow the defendant to serve and file a late answer. Justice Crane disagreed, however, relying heavily upon the long line of prior Second Department decisions, referred to above, in which the excuse of insurance company delay was rejected by the court and upon the fact that more should have been expected by the moving defendant than the simple statement regarding its "understanding" that upon receipt of the pleadings forwarded to it, the insurer would interpose an answer on its behalf. As concluded by Justice Crane, "I submit that we are constrained to reverse in this case and deny the defendant's motion to excuse their default in answering the complaint and for leave to serve and file a late answer. To do otherwise defies the authorities we traditionally apply, as enjoined upon us by the Court of Appeals (see *Gray v. B.R. Trucking Co.*, supra), deprives nisi prius of guidance and denudes the test for vacating defaults of any standards. This encourages appeals and unsettles the law."

'Lemberger'

There followed in short order the interesting case of *Lemberger v. Congregation Yetev Lev D'Satmar, Inc., et al*, __AD3d__, __NYS2d__, 2006 WL 2925287 (2d Dept. 2006) (in which the authors appeared as appellate counsel for the plaintiff). There, the action for personal injuries resulting from a slip and fall on the defendant's premises was commenced by the filing of a summons and complaint on Aug. 11, 2005, which were served upon the defendants on Aug. 23, 2005. Upon receipt, the defendants sent the pleadings to their insurer with a request for defense and indemnification. When the defendants failed timely to appear or answer the com-

Continued on page 6

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Insurance Office Failure: Reasonable Excuse for Default?

Continued from page 3

plaint, the plaintiff obtained, entered and served upon the defendants a "default judgment order" dated Dec. 9, 2005. It was not until Feb. 2, 2006 that the defendants, by assigned counsel, presented an order to show cause for an order relieving them of their default.

In support of their motion, the defendants submitted, inter alia, the affidavit of the administrator of one of the entities, confirming receipt of the summons and complaint on Aug. 16, 2005, and stating that he "immediately" sent those papers to his broker "for further handling." The defendants also submitted an affidavit of the claims manager for the local office of their insurer, which confirmed that a copy of the summons and complaint was sent to it, but it took no immediate steps to assign the matter to defense counsel because it "had no record of its being logged into our system." Further, by the time the insurer got around to sending the file to defense counsel, the default order had already been entered.

In opposing the defendant's motion, the plaintiff argued, inter alia, that "simply saying that there is no 'record' of a matter being 'logged' in, together with an admission that they did receive the papers, is not sufficient to constitute a reasonable excuse," and that "in any event, the law is clear that insurance company failure is not a sufficient excuse to vacate a default judgment [citations omitted]."

The Supreme Court, relying upon *Harcztark*, supra, and noting that pursuant thereto, insurance carrier delay "may be considered by the court in determining whether there exists a reasonable excuse for defendant's failure to timely answer the complaint," held that "in view of the absence of any prejudice to the plaintiff, the existence of a reasonable excuse and a meritorious defense, the lack of willfulness on the part of the defendant and the public policy in favor of resolving cases on their merits, the court, after argument, as a matter of discretion, excuses defendants' failure to timely answer the complaint."

Appeal

On appeal, the plaintiff argued that the *Harcztark* decision constituted an unwarranted and incorrect departure from prior Second Department precedent, and that, in any event, even accepting the thesis that "insurance company failure" may, in an appropriate case, "constitute all or part of a reasonable excuse by an insured for a default," this was not an appropriate case for application of that rule. Specifically, the plaintiff argued that the undetailed and uncorroborated statement that the summons and complaint were not "logged into our system" was deficient, and that the courts have repeatedly held that mere "overlooking" of suit papers is an insufficient excuse for a late answer,[11] that a mere confession of neglect "will not be accepted as a reasonable excuse,"[12] and that defendant "must submit facts in evidentiary form to justify the default" (id.) by means of "an affirmation...[containing] a detailed explanation of [the] oversight"[13]—which the defendants failed to do.

In response, the defendants argued, in pertinent part, that *Harcztark*, rather than the numerous earlier cases cited by the plaintiff, and which the *Harcztark* majority "already considered and duly rejected," was controlling, and that, in any event, all of those prior decisions were distinguishable from the *Lemberger* case because in *Harcztark*, the only excuse offered for the failure timely to answer the complaint was delay caused by the insurer, and in *Lemberger*, an additional factor of law office failure, i.e., additional delay by the assigned defense attorneys, was alleged.

In reversing the order below and denying the defendant's motion to vacate their default, the Second Department stated that "a *general excuse* that the default was caused by delays occasioned by the defendant's insurance carrier is insufficient" [emphasis added] [citing several of its pre-*Harcztark* decisions referred to above]. Notably, the court did not cite or refer to *Harcztarck*, at all. The court went on to conclude that "the bare allegations of [defendant's] administrator and the claims of [the insurer] that the summons and complaint were immediately forwarded to an unnamed insurance broker, without an adequate explanation for the approximately four-month gap that followed before [the insurer] allegedly received them, was insufficient to constitute a reasonable excuse for their default. The explanation proffered by [the insurer's] claims manager that 'because [the insurer] had no record of [the claim] being logged into our system, [i]t never assigned counsel to answer the complaint' did not constitute a reasonable excuse [citations omitted]."

The fact remains that the excuse that the default was caused by delays occasioned by the defendant's insurer must be more than a general excuse and it must be supported by more than bare allegations devoid of factual detail sufficient to render the failure reasonable.

Conclusion

It is unclear whether the *Lemberger* court's failure to cite *Harcztark* and its reference to the pre-*Harcztark* line of cases constitutes a repudiation of *Harcztark*. At the very least, however, it is apparent from the foregoing discussion that whether, as in the Third Department, "insurance office failure" is treated like "law office failure," or, as in the Second Department, after *Harcztark*, it is treated as one of several factors that may in an appropriate case constitute all or part of a reasonable excuse for a default, the fact remains that the excuse that the default was caused by delays occasioned by the defendant's insurer must be more than a general excuse, and it must be supported by more than bare allegations devoid of factual detail sufficient to render the failure reasonable.[14]

1. See CPLR 5015[a][1]; *Gray v. B.R. Trucking Co.*, 59 NY2d 649, 650 (1983); *Flexro, Ltd. v. Korn*, 9 AD3d 445 (2d Dept. 2004).

2. See *Krieger v. Cohan*, 18 AD3d 823 (2d Dept. 2003); *Matter of Gambardella v. Ortov Light*, 278 AD2d 494 (2d Dept. 2000).

3. See CPLR 2005; *Liotti v. Peace*, 15 AD3d 452 (2d Dept. 2005); *Korea Exch. Bank v. Attilio*, 186 AD2d 634 (2d Dept. 1992).

4. *Correa v. Ahn*, 205 AD2d 575 (2d Dept. 1994); *American Sigol Corp. v Zicherman*, 166 AD2d 628 (2d Dept. 1990).

5. *People v. New Woman, Inc.*, 197 AD2d 525 (2d Dept. 1993); *Midolo v. Horner*, 131 AD2d 825 (2d Dept. 1987).

6. See e.g., *Campbell v. Cloverleaf Transp., Inc.*, 5 AD3d 169 (1st Dept. 2004); *Storchevoy v. Blinderman*, 303 AD2d 612 (2d Dept. 2003); *Reyes v. Ross*, 289 AD2d 554 (2d Dept. 2001).

7. See *Jones v. R.S.R. Corp.*, 135 AD2d 900 (2d Dept. 1987); *Chu-Reimer v. Metpath, Inc.*, 227 AD2d 860 (3d Dept. 1996); see also, *Ayres Memorial Animal Shelter, Inc. v. Montgomery County Society for the Prevention of Cruelty to Animals*, 17 AD3d 904 (3d Dept. 2005); *Lucas v. United Helpers Cedars Nursing Home*, 239 AD2d 853 (3d Dept. 1997).

8. See *Iaia v. Modell's Shoppers World, Inc.*, 90 AD2d 823 (2d Dept. 1982) ("The failure of defendants' insurer to forward the file to an attorney to defend the instant action, which resulted in a six and one-half month delay in answering, is an inadequate excuse"); *Miles v. Blue Label Trucking, Inc.*, 232 AD2d 382 (2d Dept. 1996) ("In this case, the only excuse offered for the failure to serve a timely answer was delay caused by the insurance carrier of the defendant, Blue Label Trucking Inc., which is insufficient"); *Hazen v. Bottiglieri*, 286 AD2d 708 (2d Dept. 2001) (same); *Warn v. Choi-Lee*, 291 AD2d 490 (2d Dept. 2002) (same); *Kaplinsky v. Mazor*, 307 AD2d 916 (2d Dept. 2003) ("Here, the affirmation of defendants' attorney submitted in support of their motion to vacate indicated that the law firm was retained by the defendants' insurance carrier after the defendants' time to answer had expired. However, an insurance carrier's delay is insufficient to establish a reasonable excuse for a default"); *Campbell v. Ghafoor*, 8 AD3d 316 (2d Dept. 2004) ("The bare allegation by the defendants' attorney in an affirmation that the delay was caused by the defendant's insurance carrier was insufficient to excuse the over one-year delay in answering the complaint"); *Juseinoski v. Board of Education of City of New York*, 15 AD3d 353 (2d Dept. 2005) ("An insurance carrier's delay is insufficient to establish a reasonable excuse for a default"); *Majestic Clothing Inc. v. East Coast Storage*, LLC, 18 AD3d 576 (2d Dept. 2005) ("The continued default, blamed on insurance carrier delay and settlement negotiations, was inexcusable"); *Krieger v. Cohan*, supra ("The only excuse offered by the respondent for its failure to timely serve an answer was that its insurance carrier delayed in determining coverage, which was insufficient").

9. See *Halali v. Vista Environments*, 8 AD3d 435 (2d Dept. 2004) ("The non-party-appellant, Evanston Insurance Co., is an 'interested person'").

10. 21 AD3d at 877.

11. See *Martyn v. Jones*, 116 AD2d 508 (2d Dept. 1990).

12. See *Incorporated Village of Hempstead v. Jablonsky*, 283 AD2d 553, 554 (2d Dept. 2001).

13. See, *Hospital for Joint Diseases v. Elrac, Inc.* 11 AD3d 432, 433 (2d Dept. 2004); *Morris v. Metropolitan Transit Auth.*, 191 AD2d 682, 683 (2d Dept. 1993).

14. See also, *Pampalone v. Giant Buildings Maintenance Inc.*, 17 AD3d 556 (2d Dept.2005); *Andrade v. Ranginwala*, 297 AD2d 691 (2d Dept. 2000).