

Fiduciary Ins. Co. of Am. v New Line Taxi Inc.

2011 NY Slip Op 33961(U)

April 11, 2011

Supreme Court, Bronx County

Docket Number: 307147/2010

Judge: Lucindo Suarez

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PART 19

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

FIDUCIARY INSURANCE COMPANY OF AMERICA

RECEIVED
 BRONX COUNTY CLERK'S OFFICE

Index No. 307147/2010

APR 18 2011

Hon. LUCINDO SUAREZ,

- against -

Justice.

NEW LINE TAXI INC.

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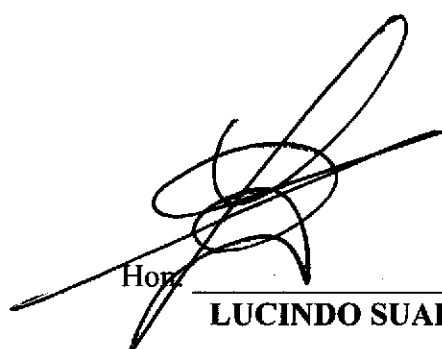
The following papers numbered 1 to 4 read on this motion, RENEW / REARGUE,

Noticed on April 8, 2011 and duly submitted as No. 60 on the Motion Calendar of April 8, 2011

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3, 4	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, the motion of plaintiff for a judgment of default against defendant New Line Taxi Inc. is granted, in accordance with the annexed decision and order.

Dated: 04/11/2011



Hon.

LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X

FIDUCIARY INSURANCE COMPANY OF AMERICA,

Plaintiff,

- against -

NEW LINE TAXI INC., and "JOHN DOE," said name
being fictitious and intended to represent the
driver/operator who is referred in complaint referred to
below,

Defendants.

-----X

DECISION AND ORDER

Index No. 307147/2010

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated March 16, 2011 and the affirmation, affidavit and exhibits submitted in support thereof; there being no opposition to the application; and due deliberation; the court finds:

Plaintiff moves for a default judgment against defendant New Line Taxi Inc. Plaintiff has provided proof of service upon said defendant and demonstrated the failure of said defendant to appear or request an extension of time to answer. Upon this motion to renew the decision and order of the undersigned dated February 17, 2011 which denied, without prejudice to renewal, plaintiff's previous application for identical relief, plaintiff has now provided proof of the additional notice to defendant required by CPLR 3215(g)(4)(i), (ii).

Furthermore, plaintiff's proof by affidavit and complaint is sufficient to demonstrate a viable cause of action against defendant. The affidavits and/or verified complaint submitted in support of a motion for default judgment pursuant to CPLR 3215 "need only allege enough facts to enable a court to determine that a viable cause of action exists." *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 70, 790 N.E.2d 1156, 1162, 760 N.Y.S.2d 727, 733 (2003); *see also* 7

Weinstein-Korn-Miller, NY Civ Prac ¶ 3215.24. The defaulting defendant is “deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.” *Id.*

While an insurer may disclaim coverage due to the insured’s failure to cooperate in the investigation of a claim, *see American Tr. Ins. Co. v. Rechev of Brooklyn, Inc.*, 57 A.D.3d 257, 867 N.Y.S.2d 914 (1st Dep’t 2008), McGuire, J. (concurring), mere inaction by an insured may be insufficient to support a non-cooperation disclaimer, *see City of New York v. Continental Cas. Co.*, 27 A.D.3d 28, 805 N.Y.S.2d 391 (1st Dep’t 2005), *appeal denied*, 2006 N.Y. App. Div. LEXIS 2996 (1st Dep’t Mar. 14, 2006). Here, however, plaintiff’s disclaimer was due not only to a lack of cooperation but was also predicated upon the failure to provide timely notice of the accident and to forward the summons and complaint in the underlying personal injury action, both of which were conditions precedent to coverage. *See Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 827 N.E.2d 762, 794 N.Y.S.2d 704 (2005); *American Tr. Ins. Co. v. Sartor*, 3 N.Y.3d 71, 814 N.E.2d 1189, 781 N.Y.S.2d 630 (2004); *White v. New York*, 81 N.Y.2d 955, 615 N.E.2d 216, 598 N.Y.S.2d 759 (1993). Accordingly, plaintiff is entitled to a declaration that there is no coverage for the underlying motor vehicle accident and that plaintiff has no duty to provide defense or indemnity with respect to the underlying motor vehicle accident.

Accordingly, it is

ORDERED, that plaintiff’s motion to renew the decision and order of the undersigned dated February 17, 2011 is granted; and it is further

ORDERED, that upon such renewal, the motion by plaintiff for a default judgment against defendant New Line Taxi Inc. is granted, on default and without opposition; and it is further

ORDERED, that the claims against defendant “John Doe” are severed and dismissed; and it

is further

ORDERED, that defendant New Line Taxi Inc. failed to satisfy conditions precedent to coverage for the underlying motor vehicle accident by failing to provide timely notice of the accident to plaintiff Fiduciary Insurance Company of America and by failing to cooperate in plaintiff's investigation of the underlying accident; and it is further

ORDERED, that plaintiff Fiduciary Insurance Company of America has no obligation to defend defendant New Line Taxi Inc. in the action entitled *Harmon v. New Line Taxi Inc.* (Index No. 304069/2009, Bronx Supreme Court); and it is further

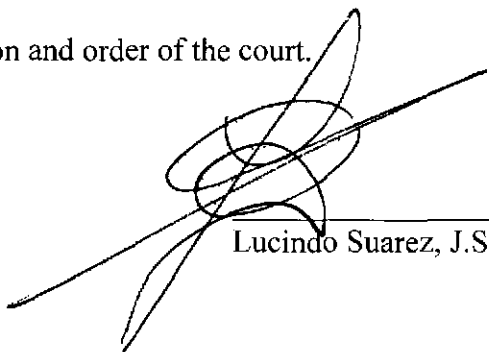
ORDERED, that plaintiff Fiduciary Insurance Company of America has no obligation to indemnify defendant New Line Taxi Inc. in the action entitled *Harmon v. New Line Taxi Inc.* (Index No. 304069/2009, Bronx Supreme Court); and it is further

ORDERED, that upon plaintiff's filing of a note of issue together with a copy of this order and payment of the appropriate fee, the Clerk of the Court is directed to enter judgment in favor of plaintiff against defendant New Line Taxi Inc. in accordance with the foregoing; and it is further

ORDERED, that the filing of a certificate of readiness for trial is waived.

This constitutes the decision and order of the court.

Dated: April 11, 2011



Lucindo Suarez, J.S.C.