

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

1224

CA 08-02075

PRESENT: SMITH, J.P., FAHEY, CARNI, PINE, AND GORSKI, JJ.

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DOLE FOOD COMPANY, INC. AND DOLE FRESH FRUIT  
COMPANY, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

LINCOLN GENERAL INSURANCE COMPANY, LEONARD'S  
EXPRESS, INC., DEFENDANTS-APPELLANTS,  
ET AL., DEFENDANT.

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LITCHFIELD CAVO LLP, NEW YORK CITY (EDWARD FOGARTY, JR., OF COUNSEL),  
FOR DEFENDANTS-APPELLANTS.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL),  
FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 17, 2008. The order, inter alia, granted plaintiffs' motion for a default judgment against defendants Lincoln General Insurance Company and Leonard's Express, Inc.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the cross motion is granted and plaintiffs are directed to accept service of the answer of defendants Lincoln General Insurance Company and Leonard's Express, Inc. dated May 14, 2008.

Memorandum: In this declaratory judgment action, Lincoln General Insurance Company and Leonard's Express, Inc. (collectively, defendants) appeal from an order granting plaintiffs' motion for a default judgment against them based on their failure to serve a timely answer and denying their cross motion seeking to compel plaintiffs to accept service of their late answer (see CPLR 3012 [d]). We agree with defendants that Supreme Court abused its discretion in granting the motion and in denying the cross motion. "A default judgment in a declaratory judgment action will not be granted on the default and pleadings alone for it is necessary that plaintiff[s] establish a right to a declaration" and, here, plaintiffs did not establish their entitlement to the declaration sought (*Merchants Ins. Co. of N.H. v Long Is. Pet Cemetery*, 206 AD2d 827 [internal quotation marks omitted]; cf. *New York Mut. Underwriters v Baumgartner*, 19 AD3d 1137, 1141).

Entered: October 2, 2009

Patricia L. Morgan  
Clerk of the Court