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Peelus Ins. Co. v RCD Restorations Inc.
2023 NY Slip Op 50034(U) [77 Misc 3d 1225(A)]
Decided on January 9, 2023
Supreme Court, New York County
Lebovits, J.
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Supreme Court, New York County

<p>Peelus Insurance Company, Plaintiff,</p> <p>against</p> <p>RCD Restorations Inc. and KEVIN PESANTEZ, Defendants.</p>
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Index No. 656582/2021

London Fischer LLP, New York, NY (James Walsh and William J. Edwins of counsel), for plaintiff.

No appearance for defendants.

Gerald Lebovits, J.

This is an insurance-coverage action arising from a construction-related personal-injury suit. Plaintiff, Peelus Insurance Company issued a general-liability policy to defendant RCD Restorations, Inc. Defendant Kevin Pesantez was injured during the policy period after falling off a ladder while working as a laborer for RCD's subcontractor, Regalado Contracting, Inc. [*2]Pesantez brought a personal-injury action against RCD. RCD then filed a third-party complaint against Regalado for indemnification. Peelus tendered Pesantez's action against

RCD to Regalado's insurer, Acceptance Indemnity Insurance Co. Acceptance disclaimed coverage and declined to defend and/or indemnify RCD.

Peleus brought this action for a declaratory judgment that (i) Peleus is not required to provide coverage for RCD in the underlying personal-injury action by Pesantez against RCD and the underlying third-party action by RCD against Regalado; (ii) Peleus may withdraw its defense of the Pesantez action and prosecution of the third-party action; and (iii) Peleus may recoup the defense/prosecution costs it incurred in those actions.

Peleus now moves under CPLR 3215 for default judgment against RCD on its declaratory-judgment claims. Neither RCD nor Pesantez have opposed the motion. The motion is granted in part and denied in part.

Peleus has established proper service on RCD (*see* NYSCEF No. 3); and RCD has not appeared. This court concludes that Peleus has also sufficiently established for default-judgment purposes that (i) under the terms of the policy Peleus does not owe RCD a duty to defense or indemnify; and (ii) Peleus may therefore withdraw its defense of Pesantez's claim against RCD, and its prosecution of RCD's third-party claim against Regalado.

This court reaches a different conclusion, however, with respect to Peleus's recoupment/reimbursement claim. Although Peleus provided RCD with coverage in the underlying action/third-party action under a reservation of rights (*see* NYSCEF No. 17 [reservation of rights letter]), the letter notifying RCD of Peleus's coverage position did not reserve the right "to recoup expenses [Peleus] incurred that are not covered by the polic[y]." ([American Home Assur. Co. v Port Auth. of NY & N.J.](#), 166 AD3d 464, 465 [1st Dept 2018] [permitting recoupment pursuant to plaintiff-insurer's reservation of rights]; [accord Certain Underwriters at Lloyd's London Subscribing to Policy No. SYN-1000263 v Lacher & Lovell-Taylor, P.C.](#), 112 AD3d 434, 435 [1st Dept 2013] [same]; *cf.* [American W. Home Ins. Co. v Gjonaj Realty & Mgt. Co.](#), 192 AD3d 28, 36-41 [2d Dept 2020] [holding that an insurer may recoup defense costs upon a no-coverage determination only if recoupment is permitted under the terms of the *policy itself*, not merely the insurer's reservation of rights letter].)

Absent a reservation of Peleus's right not merely to later deny coverage but also to obtain recoupment, this court sees no basis to permit recoupment now. (*Cf.* [BX Third Ave Partners, LLC v Fidelity Natl. Tit. Ins. Co.](#), 112 AD3d 430, 431 [1st Dept 2013] [denying recoupment

when, among other things, the insurer "undertook the defense of the . . . action without a reservation of rights"].) Nor do Peleus's motion papers identify such a basis.

Accordingly, it is

ORDERED that the branch of Peleus's motion for default judgment seeking a declaration that it is not required to provide a defense to, and provide coverage for, the defendant RCD in the action of *Kevin Pesantez v 215 Equities Corp., Blue Woods Management Group, Inc. and RCD Restorations, Inc.*, Index No. 158387/2020, New York County, is granted; and it is further

ADJUDGED AND DECLARED that Peleus is not obliged to provide a defense to, and provide coverage for, the defendant RCD in the said action pending in New York County; and it is further

ORDERED that the branch of Peleus's motion for default judgment seeking a declaration that it is not required to prosecute the claims of, and provide coverage for, the defendant RCD in the third-party action of *RCD Restorations, Inc. v Regalado Contracting, Inc.*, Index No. [*3]158387/2020, New York County, is granted; and it is further

ADJUDGED AND DECLARED that Peleus is not required to prosecute the claims of, and provide coverage for, the defendant RCD in the said action pending in New York County; and it is

ORDERED that the branch of Peleus's motion for default judgment seeking a declaration that it may withdraw its defense of RCD in connection with the action of *Pesantez v 215 Equities Corp.* described above is granted; and it is

ADJUDGED AND DECLARED that Peleus may withdraw its defense of RCD in the said action pending in New York County; and it is further

ORDERED that the branch of Peleus's motion for default judgment seeking a declaration that it may withdraw its prosecution of RCD's third-party claims in connection with the third-party action of *RCD Restorations, Inc. v Regalado Contracting, Inc.*, described above, is granted; and it is further

ADJUDGED AND DECLARED that Peleus may withdraw its prosecution of RCD's third-party claims in the said action pending in New York County; and it is further

ORDERED that the branch of Peleus's motion for default judgment seeking a declaration that it is entitled to recoup its defense and prosecution costs in the action and third-party action described above is denied, and Peleus's declaratory-judgment claim with respect to recoupment is dismissed, no costs; and it is further

ORDERED that Peleus serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

DATE 1/9/2023

[Return to Decision List](#)