

Poplawski v 111 Wall St. LLC
2020 NY Slip Op 33264(U)
October 5, 2020
Supreme Court, New York County
Docket Number: 162081/2019
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

-----X

INDEX NO. 162081/2019

TIMOTHY POPLAWSKI,

Plaintiff,

MOTION SEQ. NO. 003

- v -

111 WALL STREET LLC, 230 CENTRAL CO., LLC,
CUSHMAN & WAKEFIELD, INC., THYSSENKRUPP
ELEVATOR CORPORATION, LEC CONSULTING AND
INSPECTION GROUP INC., and MURRAY AND SENA,
LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

CUSHMAN & WAKEFIELD, INC.,

Third-Party Plaintiff,

Third-Party
Index No. 595655/2020

-against-

THYSSENKRUPP ELEVATOR CORPORATION,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 86, 87, 88, 89, 90, 96, 97, 98, 99, 100, 101, 110

were read on this motion to/for JUDGMENT - DEFAULT.

In this personal injury action, plaintiff Timothy Poplawski moves, pursuant to CPLR 3215, for a default judgment against defendants 230 Central Co., LLC and 111 Wall Street LLC. Defendant Murray and Sena, LLC cross-moves for a default judgment on its cross claims against the same defendants. After a review of the motion papers, as well as the relevant statutes and case law, the motions, which are unopposed, are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured in an elevator accident on October 1, 2018. Doc. 1 at par. 95. In the complaint, filed December 13, 2019, plaintiff alleged that the incident, which occurred at 111 Wall Street in Manhattan (“the premises”), was caused by the negligence of defendants 111 Wall Street LLC (“111”), 230 Central Co., LLC (“230”), Cushman & Wakefield, Inc. (“C&W”), Thyssenkrupp Elevator Corporation (“TEC”), and LEC Consulting and Inspection Group Inc. (“LEC”) in their operation, control, management, and/or maintenance of the premises. Doc. 1.

230 and 111 were served with process via the Secretary of State on December 27, 2019. Docs. 11 and 12, respectively. C&W, TEC, and LEC were also served with process in December 2019. Docs. 5 – 10.

In its answer filed January 27, 2020, TEC denied all allegations of wrongdoing, raised various affirmative defenses, and asserted cross claims against 111 and 230. Doc. 13.

On January 31, 2020, plaintiff filed a supplemental summons and amended complaint against defendants which added Murray and Sena, LLC (“MS”) as an additional defendant. Docs. 24 – 25.

C&W joined issue by its answer to the complaint filed February 4, 2020. Doc. 26. In its answer, C&W denied all allegations of wrongdoing, raised various affirmative defenses, and asserted cross claims against 111, 230, TEC, and LEC. Doc. 26.

On or about February 6, 2020, 230 and 111 were served with the supplemental summons and amended complaint. Docs. 39 – 42, 48 - 51. C&W, MS, LEC were also served with the amended summons and complaint. Docs. 43 – 47, 52, 54.

TEC filed its answer to the amended complaint on February 7, 2020. Doc. 28.

C&W filed an answer to the amended complaint on May 20, 2020, in which it denied all substantive allegations, raised various affirmative defenses, and asserted cross claims against 111, 230, TEC, LEC, and MS. Doc. 66. MS thereafter answered C&W's cross claims, denying all allegations of wrongdoing therein. Doc. 67.

MS filed an answer to the amended complaint on June 9, 2020, in which it denied all substantive allegations, raised various affirmative defenses, and asserted cross claims against the other defendants. Doc. 71. The answer was verified by MS' attorney. Doc. 71 at 8.

TEC also filed an answer to the amended complaint on June 9, 2020. Doc. 72. It, too, denied all substantive allegations, raised various affirmative defenses, and asserted cross claims against all other defendants. Doc. 72.

By stipulation filed July 9, 2020, plaintiff, C&W, and TEC agreed to discontinue all claims and cross claims against LEC. Doc. 80.

On August 3, 2020, plaintiff filed the instant motion, pursuant to CPLR 3215, seeking a default judgment against 111 and 230 on the amended complaint. Doc. 82. In support of the motion, plaintiff submits, inter alia, the summons and complaint, with affidavits of service (Doc. 85); the supplemental summons and amended complaint, with affidavits of service (Doc. 86); an attorney affirmation attesting to the fact that 111 and 230 have failed to answer or otherwise appear in this matter (Doc. 83 at par. 8); and an affidavit of merit by plaintiff (Doc. 84).

111 filed an answer to the amended complaint on August 7, 2020, in which it denied all substantive allegations, raised various affirmative defenses, and asserted cross claims against 230, C&W, TEC, LEC and MS. Doc. 91.

On August 12, 2020, MS cross-moved for a default judgment on its cross claims against 111 and 230. Doc. 96. In support of the cross motion, MS submits an attorney affirmation attesting

to the fact that 111 and 230 were properly served with its answer and that they failed to respond to its cross claims. Doc. 97.

C&W commenced a third-party action against TEC on August 13, 2020. Doc. 102.

MS answered TEC's cross claims on or about August 17, 2020. Docs. 106 - 107.

TEC denied 111's cross claims on or about August 20, 2020. Doc. 108.

On August 20, 2020, plaintiff stipulated to withdraw the branch of its motion seeking a default judgment against 111 and MS stipulated to withdraw the branch of its cross motion seeking a default judgment on its cross claim against 111. Doc. 110.

TEC filed its answer to the amended complaint on August 31, 2020. Doc. 113.

LEGAL CONCLUSIONS:

Plaintiff's Motion For A Default Judgment Against 230

CPLR 3215(a) provides, in pertinent part, that “[w]hen a defendant has failed to appear, plead or proceed to trial . . . the plaintiff may seek a default judgment against him.” It is well settled that a party moving for a default judgment pursuant to CPLR 3215 must establish proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the default in answering or appearing. *See Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016).

Plaintiff herein has met the requirements of CPLR 3215 by submitting affidavits of service establishing service of process on 230, his affidavit of merit setting forth the facts constituting the claim, and the affirmation of his attorney attesting to the fact that 230 has failed to answer or otherwise appear in the captioned action. Thus, plaintiff is entitled to a default judgment against 230.

MS' Cross Motion For A Default Judgment Against 230

MS' cross motion is denied on several grounds.

Initially, the cross motion is denied as procedurally defective since it is well-settled that "a cross motion is an improper vehicle for seeking affirmative relief from . . . a nonmoving party." *Asiedu v Lieberman*, 142 AD3d 858, 858 (1st Dept 2016), quoting *Mango v Long Island Jewish-Hillside Medical Center*, 123 AD2d 843, 844 (2d Dept 1986); *see* CPLR 2215. Since MS seeks affirmative relief from 230, a non-movant, the cross motion is improper. Although a Court may, in the exercise of its discretion, disregard this procedural defect (*see generally Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *Shtulberg v Metro. Transp. Auth.*, 2020 NY Slip Op 31720[U], 2020 NY Misc LEXIS 2503, *6 n 2 [Sup Ct, NY County 2020]), MS provides no reason for the exercise of such discretion here.

The cross motion is denied on an additional procedural ground as well. CPLR 3011 provides that "[t]here shall be . . . an answer to a cross-claim that contains a demand for an answer [and that] [i]f no demand is made, the cross-claim shall be deemed denied or avoided." CPLR 3011; *Giglio v NTIMP, Inc.*, 86 AD3d 301, 310 (2d Dept 2011) citing *Green Point Sav. Bank v Pagano*, 103 AD2d 735 (2d Dept 1984). "The denial that is 'deemed' by law to have been made occurs at the time that an answer to the cross claim would otherwise be due." *Giglio v NTIMP, Inc.*, 86 AD3d at 310. Where, as here, "an answer is not demanded in response to a cross claim, the denial that is 'deemed' to have been made under CPLR 3011 will foreclose any motion for a default judgment on the cross claim . . ." *Id.*

Finally, although MS established that 230 was served with its answer (Doc. 71 at 7 – 8) and that it failed to respond to the same (Doc. 97 at par. 6), it has not set forth the facts constituting its cross claim. Although MS' answer is verified by its attorney (Doc. 71 at 6):

any claim verified by an attorney is insufficient to support a default judgment motion when the attorney lacks personal knowledge of the facts constituting the claim (*see Joosten v Gale*, 129 AD2d 531 [1st Dept 1987]; *see also Colonial Country Club, Inc. v Ellenville*, 89 AD2d 935 [3d Dept 1982]). In the absence of some evidence in admissible form demonstrating the merit of [MS' cross claim] against [230], [MS'] motion for a default judgment must be denied (*see Joosten, supra; see also Manhattan Telecom. Corp. v. H & A Locksmith, Inc.*, 21 NY3d 200 [2013]).

Niang v Mance, 2020 N.Y. Misc. LEXIS 4982, at *1-2 (Sup Ct, Bronx County June 26, 2020, No. 28421/2019E).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Timothy Poplawski seeking a default judgment against defendant 230 Central Co., LLC pursuant to CPLR 3215 is granted, without opposition; and it is further

ORDERED that the branch of the motion by plaintiff Timothy Poplawski seeking a default judgment against defendant 111 Wall Street LLC pursuant to CPLR 3215 is denied as moot given the withdrawal of said branch of the motion; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Timothy Poplawski on the issue of liability as against defendant 230 Central Co., LLC only; and it is further

ORDERED that an assessment of damages as against defendant 230 Central Co., LLC is held in abeyance and shall occur at the time of trial or other dispositive determination; and it is further

ORDERED that the branch of the cross motion by defendant Murray and Sena, LLC seeking a default judgment pursuant to CPLR 3215 on its cross claims against 111 Wall Street LLC is denied as moot given the withdrawal of said branch of the motion; and it is further

ORDERED that the branch of the cross motion by defendant Murray and Sena, LLC seeking a default judgment pursuant to CPLR 3215 on its cross claims against 230 Central Co., LLC is denied; and it is further

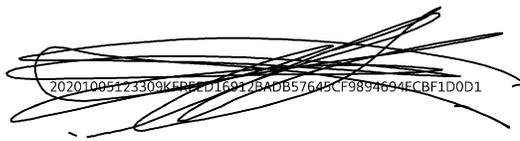
ORDERED that, within twenty (20) days of the entry of this order, plaintiff shall serve a copy of the same on defendants and all parties to this action and on the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that the remaining parties are to participate in a telephonic compliance conference in this matter on January 14, 2021 at 2:30 p.m. in IAS Part 2; and it is further

ORDERED that this constitutes the decision and order of the Court.

10/5/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: