

Smith v Mor Rosen LLC
2025 NY Slip Op 35251(U)
December 16, 2025
Supreme Court, Kings County
Docket Number: Index No. 518561/2023
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of December 2025

HONORABLE FRANCOIS A. RIVERA

-----X
ALLAN SMITH,

Plaintiffs,

- against -

MOR ROSEN LLC, MAZEH CONSTRUCTION CORP.,
TRUTH CENTER OF DIVINE AWARENESS, AND
NT MANAGEMENT NY CORP.,

Defendants.

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DECISION & ORDER

Index No.: 518561/2023

Oral Argument: 12/11/2025

Cal. No.: 45

Ms. Seq. No.: 5

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on October 22, 2025, under motion sequence number five, by plaintiff Allan Smith seeking an order granting a default judgment against defendants, Mazeh Construction Corp., NT Management NY Corp., and Truth Center of Divine Awareness. The motion is opposed by defendant Mor Rosen LLC and NT Management NY Corp.

- Notice of motion
- Affirmation in support
 - Exhibits A-D
- Affirmation in partial opposition
 - Exhibits A-B

BACKGROUND

On June 26, 2023, the plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint with the Kings County Clerk’s Office (KCCO).

On August 16, 2023, defendant Mor Rosen LLC interposed and filed a verified answer with the KCCO.

By notice of motion filed on July 24, 2024, under motion sequence number one, plaintiff sought an order pursuant to CPLR 3025 (b), granting, among other things, leave to supplement his summons and amend his verified complaint to include causes of action against proposed defendant, Truth Center of Divine Awareness. By decision and order dated May 9, 2024, the Court, among other things, granted plaintiff's motion under sequence number one.

By notice of motion filed on July 24, 2024, under motion sequence number four, plaintiff sought an order pursuant to CPLR 3025 (b), granting, among other things, leave to supplement his summons and amend his verified complaint to include causes of action against proposed defendant, NT Management NY Corp. By decision and order dated October 30, 2024, the Court, among other things, granted plaintiff's motion under sequence number four thus yielding the second amended verified complaint.

The second amended verified complaint alleged the following salient facts. On February 20, 2023, plaintiff was lawfully on the premises at or near 18 Prescott Place and 20 Prescott Place located in the County of Kings, City and State of New York, and was caused to be seriously injured when he was caused to trip and fall due to a broken, cracked, misaligned, and/or otherwise defective condition in the aforesaid premises. This occurrence was caused by reason of the negligence, carelessness, and recklessness of the defendants, and/or defendant's agents, servants, and/or employees, in the ownership, management, maintenance, control, supervision, inspection, repair, design, renovation, and construction of the aforesaid premises. The defendants were negligent in creating the said broken, cracked, misaligned and/or otherwise defective condition, and in failing to properly inspect, remedy, and/or remove said dangerous condition.

MOTION PAPERS

The plaintiff's instant motion papers consist of a notice of motion, an affirmation of its

counsel, Born Bernstein (hereinafter “Bernstein”), an affidavit of service of the motion papers, and four annexed exhibits labeled A through D.

Bernstein’s affirmation described exhibit A as the summons and complaint filed on June 26, 2023. It described exhibit B as the supplemental summons and verified second amended complaint filed on November 6, 2024. It described exhibit C as the affidavits of service of the plaintiff’s supplemental summons and verified amended filed on November 15, 2024 on defendants, Mazeh Construction Corp., NT Management NY Corp., and Truth Center of Divine Awareness. Bernstein’s affirmation described exhibit D as the plaintiff’s first and second good faith default letters sent to defendants, Mazeh Construction Corp, NT Management NY Corp., and Truth Center of Divine Awareness.

Bernstein’s affirmation referred to a document annexed to the motion labeled exhibit E. He further averred that exhibit E was an affidavit of merit of the plaintiff setting forth the basic facts in connection with the instant action. The plaintiff’s motion papers, however, did not include an annexed document labeled E. The plaintiff’s motion did not include an affidavit of merit of the plaintiff setting forth the basic facts in connection with the instant action.

The opposition papers by defendant Mor Rosen LLC and NT Management NY Corp. included an affirmation of its counsel, Michael P. Turi (hereinafter “Turi”), and two exhibits labeled A and B. Turi’s affirmation described exhibit A as a stipulation which was filed on November 17, 2025, and signed by himself and Bernstein. The stipulation extended the time for defendant NT Management NY Corp. to appear and answer the complaint to November 28, 2025, with all jurisdictional defenses waived. Turi’s affirmation described exhibit B as the answer of Mor Rosen LLC and NT Management that Turi filed on November 26, 2025, pursuant to the terms of the stipulation.

LAW AND APPLICATION

The original summons and complaint filed in the instant action on June 26, 2023 was amended by the Court orders, which resolved plaintiff's motion sequence number one and four. As a threshold issue, the court notes that an amended complaint, once served, replaces the initial complaint, and becomes the only complaint in the case as though the initial complaint was never served (*Elegante Leasing, Ltd. v. Cross Trans Svc, Inc.*, 11 AD3d 650, 650 [2d Dept 2004]; see *Titus v Titus*, 275 AD2d 409, 409-410 [2d Dept 2010]). Consequently, the second amended verified complaint, which is annexed as exhibit B to the plaintiff's motion, is the current operative pleading.

CPLR 3215 provides, in pertinent part, as follows:

“(a) Default and entry. When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him . . .”

“(f) Proof. On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint . . . and proof of the facts constituting the claim, the default and the amount due . . . by affidavit made by the party . . . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney . . .”

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing” (*Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.*, 89 AD3d 649, 651 [2d Dept 2011], citing CPLR 3215 [f]). “CPLR 3215 (f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit

‘made by the party’” (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009], citing CPLR 3215 [f]).

The second amended verified complaint is verified by the plaintiff’s attorney pursuant to CPLR 3020 (d). However, the pleading does not demonstrate that the attorney has personal knowledge of the underlying facts supporting the claim (*see King v King*, 99 AD3d 672, 673 [2d Dept 2012]). Therefore, the second amended verified complaint may not be used in lieu of an affidavit by the plaintiff pursuant to CPLR 105 (u) (*see CPLR 105 [u]*). There is no affidavit by a party attesting to a viable claim against any of the defendants. Therefore, the motion is denied without prejudice (*HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2d Dept 2009]).

CONCLUSION

The motion by plaintiff Allan Smith for an order pursuant to CPLR 3215 granting a default judgment against defendants, Mazeh Construction Corp., NT Management NY Corp., and Truth Center of Divine Awareness is denied without prejudice.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.