

<b>Stith v City of New York</b>
2007 NY Slip Op 33706(U)
November 14, 2007
Supreme Court, New York County
Docket Number: 0106383/2007
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN A. RAKOWER  
Justice  
J.S.C.

PART 5

Stith, R

INDEX NO. 106383/07

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 01

City

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**

NOV 19 2007

CLERK'S OFFICE  
NEW YORK

Dated: 11/14/07

EILEEN A. RAKOWER  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
KEVIN STITH,

Plaintiff,

Index No.  
106383/07

- against -

Decision and Order

THE CITY OF NEW YORK, THE NEW YORK CITY  
POLICE DEPARTMENT, POLICE OFFICER DANNY  
KEARNEY and POLICE OFFICER "JOHN" DEJESUS,  
said first name being fictitious,

Motion Seq.: 001

Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action for alleged false arrest , wrongful imprisonment and malicious prosecution. Plaintiff alleges that the arrest occurred on February 17, 2006 on 1<sup>st</sup> Avenue between 120<sup>th</sup> Street and 121<sup>st</sup> Street New York, New York. Plaintiff now moves for a default judgment against defendants Police Officer "Danny Kearney" ("Kearney") and Police Officer "John" Dejesus ("Dejesus"). Defendant the City of New York ("City") opposes the motion.

Plaintiff served Officers Kearney and Dejesus with a summons and complaint by delivering and leaving a copy with P.A.A. Esbri, a person of suitable age and discretion, at the 25<sup>th</sup> precinct, where they were both allegedly employed on July 11, 2007. Plaintiff mailed a copy of the summons and complaint to both defendants' actual place of business on July 12, 2007. Plaintiff moves for a default judgment against both Kearney and Dejesus.

City, in opposition, argues that it interposed an amended answer on behalf of Dejesus and served plaintiff on October 16, 2007, after Dejesus officially requested representation. City argues that it served its answer on behalf of Dejesus late because the decision to represent a police officer is a time consuming process. (Harris v. City of New York, 30 A.D.3d 461[2nd Dept.2006]). Additionally, City attributes its delay in answering on behalf of Dejesus to its own investigation into plaintiff's arrest, which

revealed that the arrest occurred on February 24, 2006, not February 17, 2006.

City submits the affidavit of Douglas Maclean, Sergeant from the 25<sup>th</sup> Precinct, who states that no one by the name of "Danny Kearney" worked at that precinct. The arrest report submitted by City shows that Officer Dejesus was the arresting officer. Further, Officer Dejesus was accompanied by Police Officer Matthew Cerny.

City claims that plaintiff's attorney acknowledged receipt of the amended answer and that City informed plaintiff's attorney of the correct name of the officer to whom he should address the complaint. City submits two letters that it sent to plaintiff's attorney requesting that the instant motion be withdrawn, but plaintiff's attorney failed to respond or withdraw the motion.

Pursuant to General Municipal Law Section 50-k(2), the City is obligated to provide a defense to its employees in any civil action:

arising out of any alleged act or omission which the corporation counsel finds occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.

Courts have found delays excusable where the defendant employee was awaiting a determination as to whether the City would be undertaking his or her defense. (Harris at 465). City has provided a reasonable excuse for its delay in answering on behalf of Officer Dejesus.

CPLR §3012(d) states:

Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

Plaintiffs seek a default judgment as against Danny Kearney. The City, at the very least, has raised a traversable issue regarding whether such individual was properly served at the 25<sup>th</sup> precinct. Further, if an officer named Danny Kearney does not exist, it would be an exercise in futility to enter a default judgment against a nonexistent person. (Stanski v. Ezersky, 210 A.D.2d 186[1st Dept. 1994]).

Wherefore it is hereby

ORDERED that plaintiff's motion for a default judgment is denied; and it is further

ORDERED that the amended answer dated October 16, 2007 shall be deemed timely served.

This constitutes the Decision and Order of the Court.

All other relief requested is denied.

DATED: NOVEMBER 14, 2007

  
EILEEN A. RAKOWER, J.S.C

**[ FILED ]**  
NOV 19 2007  
COUNTY CLERK'S OFFICE  
NEW YORK