

Jewa v City of New York

2008 NY Slip Op 30404(U)

January 29, 2008

Supreme Court, New York County

Docket Number: 0112149/2007

Judge: Paul G. Feinman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. PAUL G. FEINMAN

PRESENT: _____

PART 52

Index Number : 112149/2007

JEWA, AUREA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

DEFAULT JUDGMENT

INDEX NO. 112149/2007

MOTION DATE 1-15-08

MOTION SEQ. NO. 001

MOTION CAL. NO. 46

his motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED

FEB 13 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/29/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

AUREA JEWAW,
Plaintiff,

against

Index Number 112149/2007
Submission Date 1-15-08
Mot. Seq. No. 001
Cal. No. 46

CITY OF NEW YORK, CORP., NEW YORK
CITY DEPARTMENT OF TRANSPORTATION,
MARL ASSOCIATES, ML HOLDINGS MANAGEMENT
CORPORATION, 108 DELANCEY STREET, LLC,
114 DELANCEY STREET LLC, MCDONALD'S
CORPORATION, RAINBOW USA INC., and
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendants.

DECISION AND ORDER

FILED
FEB 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X

Papers considered in review of this motion to enter a default judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1,2</u>

PAUL G. FEINMAN, J.:

Plaintiff moves for entry of a default judgment against defendants Marl Associates, ML Holdings Management Corporation, and 114 Delancey Street, LLC (collectively, "the non-appearing defendants") based on their failure to submit an answer in this action. For the following reasons, plaintiff's motion is granted to the extent of setting this matter down for an inquest as to damages as against two of the non-appearing defendants at the time of trial of the remainder of the action against the appearing defendants and denied as to Marl Associates.

On September 7, 2007, plaintiff filed a verified complaint alleging that defendants were negligent in their maintenance of a property located at 108 and 110-114 Delancey Street, New York, New York. Plaintiff alleges that on March 28, 2007 she sustained permanent personal

injuries as the result of a fall that occurred on a broken sidewalk adjacent to property either owned, controlled, managed, or maintained by the defendants in this action.

Pursuant to CPLR 3215(f), an application for default judgment must contain proof of summons service including a complaint or notice, proof of the claim, and proof of the default.

In this case, plaintiff submits affidavits of service of the summons with complaint on the non-appearing defendants via the New York State Secretary of State on October 1, 2007. (Exhibit 2). CPLR 3215(g)(4)(i) and New York's Business Corporation Law (BCL) 306 require service of summons on a corporation be made via the Secretary of State and that an additional copy of the summons be mailed to the corporation defendant at its last known address at least twenty days before entry of the judgment. Plaintiff's affidavits of service show that an additional copy of the summons and complaint, along with the required BCL 306 notice that service was made on the Secretary of State, was sent to defendant ML Holdings Management Corporation at its last known address. Thus, ML Holdings was properly served.

Pursuant to New York's Limited Liability Company (LLC) Law 303, service of process on an LLC is made by personally hand delivering process to the Secretary of State or his or her authorized agent. Plaintiff's affidavit shows that service of process on defendant 114 Delancey Street LLC was properly effectuated.

Defendants ML Holdings and 114 Delancey Street, after receiving service of the complaint, failed to submit an answer or request an extended time to answer the complaint. Plaintiff served the non-appearing defendants with notice of their default on or about November 9, 2007. Copies of the letters notifying defendants ML Holdings and 114 Delancey Street of plaintiff's service of the summons with complaint via the Secretary of State and providing the

non-appearing defendants with an additional service of the summons via mail are annexed to the moving papers and establish compliance with CPLR 3215 (g)(4)(ii) and BCL 306(b). (Exhibit 3).

Further, plaintiff has submitted proof of her claim by averring, in her affidavit of merit, that her fall and injuries sustained were the result of defendants' negligence and/or that of their agents and/or employees in failing to maintain the sidewalk. (Exhibit 4). With respect to the requirement of proof of default, here the affidavit submitted by plaintiff's attorney in support of the motion for default judgment is sufficient to establish the non-appearing defendants' default.

In addition to proper service of the complaint, plaintiff must also effectuate proper service of the motion requesting a default judgment. In this case, plaintiff's attorney has submitted an affirmation of service, stating that on December 20, 2007, he personally mailed copies of the notice of motion and supporting papers to all of the named defendants in this action, which includes the three non-appearing defendants against whom a default judgment is being sought. (Exhibit 4).

However, under CPLR 310, service of process on a partnership requires that service be made on any of the partners or by personal delivery to either the managing partner or general agent of the partnership. Service of process may also be made to any other agent or employee of the partnership authorized to accept such service of process. In the event that service is impracticable, then the summons may be affixed to the door of the intended partner's actual place of business within the state and also sent via first class mail to the partner's last known address. As to defendant Marl Associates, which according to the complaint is a partnership, plaintiff's affidavits show that service of process was improper as it was made via the Secretary of State with no evidence that the partners or partnership designated the Secretary of State as

their agent to accept process. There is no affidavit of service which establishes that the summons and complaint were effectively served on this defendant. Plaintiff's reference to and use of BCL 307 for service of a foreign corporation does not apply to a partnership. Accordingly, the plaintiff has failed to show its entitlement to a default judgment as against Marl Associates and that branch of the motion must be denied.

Accordingly, it is


ORDERED that the motion for entry of a default judgment is granted against the non-appearing defendants ML Holdings Management Corporation, and 114 Delancey Street LLC to the extent of setting this matter down for an inquest as to damages only as to these defendants at the time of the trial as against the appearing defendants, or at such time as the assigned trial justice may determine; and it is further

ORDERED the branch of the motion which seeks entry of a default judgment as against the non-appearing defendant Marl Associates is denied; and it is further

ORDERED that movant shall serve a copy of this order with notice of entry upon all parties, appearing and non-appearing.

This constitutes the decision and order of the court.

Dated: Jan. 29, 2008
New York, New York



J.S.C.

(2008 D&O_112149_2007_001rg)

FILED
FEB 13 2008
NEW YORK
COUNTY CLERK'S OFFICE