

Genitti v 301 W. 45th St., LLC
2008 NY Slip Op 31577(U)
June 11, 2008
Supreme Court, New York County
Docket Number: 0105068/2004
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.
Justice

PART 10

Index Number : 105068/2004

GENITTI, ANNA A.

INDEX NO. _____

vs

301 WEST 45TH STREET

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

RENEWAL

MOTION CAL. NO. _____

s motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

JUN 10 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/3/08

JJG
HON. JUDITH J. GISCHE *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: PART 10

-----X
ANNA A. GENITTI,

Plaintiff,

-against-

301 WEST 45th STREET LLC, NORMAN PESSEL
Marshal of the City of New York Badge #29, ALL PRO
STORAGE and TRAFFIC MOVING SYSTEMS INC.,
"JOHN and JANE DOE'S" WHO ARE PRESENTLY
UNKNOWN,

Defendants.
-----X

301 WEST 45th STREET, LLC,

Third-Party Plaintiff,

-against-

ALL PRO STORAGE INC. and TRAFFIC MOVING
SYSTEMS INC.,

Third-Party Defendants.
-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers

Numbered

Onekey's motion [d j/mt] w/TV affirm in support, exhs 1

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This action was brought by plaintiff to recover based upon alleged damages sustained to property, allegedly sustained on April 2, 2001 at the premises located at 301 West 45th Street in Manhattan (the "premises"). Third-party plaintiff 301 West 45th Street ("301 West"), owner of the premises, now moves to renew its prior motion for entry of a default judgment and upon such renewal seeks entry of a default judgment on the issue of

Decision/Order

Index No.: 105068/04

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Third-Party
Index No.: 590485/07
FILED
JUN 10 2008
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NEW YORK

[* 3]

liability against third-party defendant All Pro Storage Inc. ("All Pro"). The court previously denied a motion for entry of a default judgment on the issue of liability by 301 West and against third-party defendants All Pro Storage Inc. ("All Pro") and Traffic Moving Systems, Inc. ("Traffic"), by order and decision dated January 3, 2008. Since the denial was without prejudice, permission to renew is granted (CPLR 2221(d)(2), Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]).

301 West has demonstrated that service of the underlying third-party complaint was made on All Pro in conformance with BCL § 306. CPLR § 311 (a) (1). Nonetheless, All Pro has not answered the third-party complaint nor otherwise appeared in this action within the time provided under the CPLR. Therefore, this motion is submitted on default to the court.

Plaintiff alleges that she sustained property damage as a result of negligent handling and storage of her possessions after she was lawfully evicted from the premises. Relevant to this motion, 301 West has asserted a cause of action for indemnification and/or contribution against All Pro in the cross complaint.

Robert Hammer, the property manager for 301 West, states in his affidavit that All Pro and Traffic maintained, handled or removed plaintiff's possessions from the premises. 301 West states it did not have any role in the maintenance, handling or removal of plaintiff's possessions from the premises. 301 West argues that if plaintiff sustained property damage as alleged in the underlying complaint, that such damage resulted from All Pro's negligent maintenance, handling and/or removal of plaintiff's possessions from the subject premises.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (Rokina

[* 4]
Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 [1984]), 301 West is only entitled to a default judgment in its favor, provided it otherwise demonstrates that it has a *prima facie* cause of action (Gagen v. Kipany Productions Ltd., 289 AD2d 844 [3d Dept 2001]).

The above claims demonstrate that 301 West has *prima facie* causes of action for common law indemnification and contribution against All Pro. Accordingly, 301 West is entitled to entry of default judgment on liability with respect to the cross-complaint. Since damages can only be ascertained at a hearing, the court directs that there be an inquest at the time of trial in the main action.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that the motion by Defendant/Third Party Plaintiff 301 West 45th Street LLC for entry of a default judgment against Third Party Defendant All Pro Storage is hereby granted to the extent that 301 West 45th Street LLC is entitled to entry of a default judgment on liability with respect to the sole cause of action in the cross complaint for contribution and common law indemnification; and it is further

ORDERED that there be an inquest at the time of trial in the main action for an assessment of damages with respect to the sole cause of action contained in the cross complaint.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
June 3, 2008

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK