

Colon v Broadway 189 Realty Corp.

2009 NY Slip Op 31519(U)

July 8, 2009

Supreme Court, New York County

Docket Number: 112431/2007

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 112431/2007
COLON, NELSON
VS.
BROADWAY 189 REALTY
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. 112431/2007
MOTION DATE 4/23/09
MOTION SEQ. NO. 002
MOTION CAL. NO. 24
this motion to/for 15

PAPERS NUMBERED

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

1,2

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
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/8/09

[Signature]
J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

NELSON COLON,

Plaintiff,

-against-

BROADWAY 189 REALTY CORP., FAMILY
HEALTH MANAGEMENT II, INC., BROADWAY
MEDICAL & DENTAL, LLC, BROADWAY FAMILY
MEDICAL & DENTAL CENTER, TOTAL MEDICAL
P.C. AND L.K. DENTAL P.C.,

Defendants.

-----X

BROADWAY 189 REALTY CORP.,

Third-Party Plaintiff,

-against-

FAMILY HEALTH MANAGEMENT II, INC.,
BROADWAY MEDICAL & DENTAL, LLC,
and BROADWAY FAMILY MEDICAL & DENTAL
CENTER,

Third-Party Defendants.

-----X

For the Third-Party Plaintiff:
Gannon, Rosenfarb & Moskowitz
By: John M. Piccirillo, Esq.
120 Broadway-30th Floor
New York, NY 10271
(212) 655-5000

For the Third-Party Defendants:
Did Not Appear

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Papers considered in review of this motion for default judgment:

Papers	Documents Numbered
Motion & Attachments	1
Memorandum of Law	2

PAUL G. FEINMAN, J.:

Third-party plaintiff moves for entry of a default judgment pursuant to CPLR 3215 against third-party defendants Family Health Management II, Inc., Broadway Medical & Dental, LLC, and Broadway Family Medical & Dental Center. For the reasons which follow, the motion,

although unopposed, is denied in its entirety.

Plaintiff Nelson Colon commenced this action by filing with this Court a summons and a verified complaint against Broadway 189 Realty Corp on September 14, 2007. (Exhibit A). Plaintiff's complaint alleged that on April 6, 2007 he was caused to fall inside the premises known as 4405 Broadway, New York. The defendant served its verified answer on January 23, 2008. (Exhibit B). On March 17, 2008, defendant commenced a third-party action against Family Health Management II Inc., Broadway Medical & Dental, LLC, and Broadway Family Medical & Dental Center. (Exhibit C). The third-party complaint demands contractual and common law indemnification and/or contribution from the third-party defendants.

On June 2, 2008, plaintiff filed an amended summons and complaint against the original defendant, the third-party defendants and two further entities, Total Medical P.C. and L.K. Dental P.C., naming them all as direct defendants. (Exhibit E). Plaintiff then moved for, and was granted on December 1, 2008, a default judgment pursuant to CPLR 3215(a) against Family Health Management II Inc., Broadway Medical & Dental, LLC, and Broadway Family Medical & Dental Center based on these defendants' failure to appear. (Exhibit F). Finally, after a number of notices and adjournments, a preliminary conference was held on January 28, 2009, with the parties who have appeared. Defendant Broadway 189 Realty then made the instant motion.

An applicant for a default judgment must satisfy the proof requirements established by CPLR 3215(f): 1) proof of notice of summons and complaint; 2) proof of claim; and 3) proof of default. As to the third-party defendants, third-party plaintiff provided proof of service to Broadway Medical & Dental, LLC and Broadway Family Medical & Dental Center at their places of business, pursuant to CPLR 311 (a)(1), and to Family Health Management II through

the office of the New York Secretary of State pursuant to Business Corporation Law § 306(b)(1). (Exhibit D). Where a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation served pursuant to Business Corporation Law § 306(b)(1), an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment. (CPLR 3215[g][4]). Here, however, the third-party plaintiff's papers "fail to comply with the simple, but mandatory, statutory requirements of CPLR § 3215(g)(4)(i) and (ii), i.e. that an additional copy of the summons be sent to the corporation at its last known address at least 20 days earlier." (*State Farm Mut. Auto. Ins. Co. v Unique Flooring Co., Inc.*, 11 Misc3d 1074(A),1 [Dist Ct, Nassau County 2006]). Plaintiffs provide no proof of any such service, and therefore the motion is denied as to Family Health Management II.

As to the two other third-party defendants, as well as to Family Health Management II, the third-party complaint alleges that pursuant to a lease agreement, a copy of which has not been appended to the motion papers, the third-party defendants are liable to third-party plaintiff by way of indemnification and or contribution, in the event the third-party plaintiff is found liable in the main action. It also claims breach of contract in that the lease required the third-party defendants to secure liability insurance for loss or damages sustained on the premises, something Broadway 189 claims the parties never did. Third-party plaintiff also claims the lease agreement required defendants to maintain and repair the subject premises. None of the third-party defendants have answered, appeared, nor made any attempt to appear, and a default judgment was already entered against all three in the main action. (Exhibit F). As stated above, after a number of notices and adjournments, a preliminary conference with regard to the third-party action went forward on January 28, 2009, without these parties. (Exhibit G, H).

Notwithstanding the above, the instant motion is still denied. This is because the proof of the claim offered is inadequate without a copy of the lease agreement or a proper affirmation made by plaintiff. "Some proof of liability is [also] required to satisfy the court as to the prima facie validity of the uncontested cause of action. The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts. Here, plaintiff failed to meet even that minimal standard. His complaint, verified as it is by his attorney, is pure hearsay, utterly devoid of evidentiary value." (*Joosten v Gale*, 129 AD2d 531, 535 [1st Dept. 1987], citing 4 Weinstein-Korn-Miller, NY Civ Prac ¶¶ 3215.22-3215.27). While a verified complaint may serve as an affidavit of the claim, it is not sufficient for a default judgment if it is only verified by plaintiff's attorney, as it is here. (See. *Joosten v Gale*, 129 AD 2d at 535). Third party plaintiff's motion for a default judgment is therefore denied in its entirety. Accordingly it is

ORDERED that the third-party plaintiff's motion for a default judgment is denied in its entirety; and it is further

ORDERED that all parties shall appear on September 9, 2009, at 2:15 p.m. as previously scheduled for a compliance conference in Supreme Court, Part 12, 60 Centre Street, Room 212.

This constitutes the decision and order of the court.

Dated: July 8, 2009
New York, New York

