

Danvers v Siskin

2010 NY Slip Op 31931(U)

July 16, 2010

Supreme Court, New York County

Docket Number: 105858/09

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 : 105858/2009
DANVERS, LUIS
VS.
SISKIN, BARRY, ESQ.
SEQUENCE NUMBER : 001
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

_____ in this 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

FILED

JUL 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

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

Inquest set for 9/2/10 @ 2:15 P.M.

Dated: JUL 16 2010

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

LUIS DANVERS,

Plaintiff,

-against-

BARRY SISKIN, ESQ.

Defendant.

-----X

Decision/Order

Index No.: 105858/09

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

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

Papers

Pltf's n/m [§ 3215] w/JDB affirm,

Numbered

..... 1

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Gische, J.:

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

In motion sequence 001, plaintiff moves, pursuant to CPLR § 3215, for an order directing the entry of a default judgment against defendant and directing an inquest on the issue of damages.

Background

This action for legal malpractice arises out of defendant's alleged negligent misrepresentation of plaintiff in a personal injury case.

On May 6, 2009, plaintiff served a summons and verified complaint on defendant at his law office, located at 225 West 34th Street, Suite 900, New York, New York. See Notice of Motion, Exhibit A, Affidavit of Service. On June 8, 2009, defendant's law office contacted plaintiff's counsel and requested an extension of time to appear and

answer. Plaintiff's counsel granted the defendant a three-week extension of time to serve his answer. Defendant did not serve his answer.

On July 1, 2009, plaintiff's counsel wrote to defendant informing him that no responsive pleading had been received by the extension deadline, and that if a responsive pleading was not received by July 6, 2009, plaintiff would file a motion for a default judgment. See Notice of Motion, Exhibit B. To date, defendant has not served any responsive pleading.

In June 2010, plaintiff filed this motion for an order directing entry of a default judgment and for an inquest on damages. Defendant was served with a copy of this motion at his law office on May 19, 2010. Defendant has not submitted opposition to this motion.

Analysis

CPLR §§ 3215 (a) and (f) provide, in pertinent part,

(a) 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) On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint, or a summons and notice served pursuant to subdivision (b) of rule 305 or subdivision (a) of rule 316 of this chapter, 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.

CPLR § 3215 (a) permits a party to seek a default judgment against a defendant

who fails to plead. In support of a motion seeking a default judgment, the moving party must present proof of service of the summons and the complaint, as well as affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f). The moving party must also make a *prima facie* showing of the causes of action against the defaulting party. Joosten v Gale, 129 AD2d 531 (1st Dept 1987).

Plaintiff has provided the court with proof of proper service of the summons and complaint. See Notice of Motion, Exhibit A, Affidavit of Service. Service was made in accordance with CPLR § 308, by personally serving defendant at his place of business, as well as serving him by mail to defendant's place of business. *Id.*

Plaintiff, however, has failed to submit some proof of liability, as required "to satisfy the court as to the *prima facie* validity of the uncontested cause of action." Guzetti v City of New York, 32 AD3d 234, 235 (1st Dept 2006). While a verified complaint may be used as the affidavit of the facts constituting the claim and the amount due (CPLR § 3215 [f]), the Appellate Division, First Department, has consistently held that "a complaint verified by counsel is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR § 3215." Beltre v Babu, 32 AD3d 722, 723 (1st Dept 2006); see also Guzetti v City of New York, 32 AD3d 234, *supra*. "[A] judgment entered without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim renders that judgment a nullity." Beltre v Babu, 32 AD3d at 723.

Here, plaintiff did not submit an affidavit in support of his motion, and the complaint was verified by his attorney, who has no personal knowledge of the facts

giving rise to this action. Therefore, plaintiff has not demonstrated that it has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 (3d Dept. 2001).

The Court, therefore, determines that there has been a default in answering, but, otherwise, sets this matter down for an Inquest on issues of liability and damages.

Conclusion

It is hereby

ORDERED that plaintiff's motion for entry of a default judgment against defendant, Luis Danvers, is granted to the extent that defendant has defaulted in answering; and it is further

ORDERED that plaintiff is directed to file the Note of Issue by August 20, 2010; and it is further

ORDERED that plaintiff is to appear for an Inquest on liability and damages on **September 2, 2010 at 2:15p.m.**, at 60 Centre Street, Part 10, Room 232; and it is further

ORDERED that any relief requested but not addressed is hereby expressly denied; and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York
July 16, 2010

So Ordered:

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

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JUL 23 2010
NEW YORK
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