

Hirsch v New York City Dept. of Educ.

2011 NY Slip Op 31981(U)

July 12, 2011

Supreme Court, New York County

Docket Number: 103504/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE

PART 1

Index Number : 103504/2010
 HIRSCH, YITZCHAK M.
 VS.
 N.Y.C. DEPT. OF EDUCATION
 SEQUENCE NUMBER : 002
 DEFAULT JUDGMENT
2.14.11 to 1

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

his motion to/for default judgment

PAPERS NUMBERED

1, 2
3

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

30. 11. 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/15/11

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 5

-----X
YITZCHAK M. HIRSCH, a/k/a JUSTIN HIRSCH, by
DEVORAH HIRSCH, Mother and Guardian ad Litem
of YITZCHAK M. HIRSCH, a/k/a JUSTIN HIRSCH,
and DEVORAH HIRSCH

Index No. 103504/10
Motion Date: 5/10/11
Motion Seq. No.: 002

DECISION & ORDER

Plaintiffs,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,
THE BOARD OF EDUCATION OF THE CITY OF NEW
YORK, CITY OF NEW YORK, POLICE COMMISSIONER
RAYMOND W. KELLY, in his official capacity, JAMES
SECRETO, ASSISTANT CHIEF and COMMANDING
OFFICER OF THE NYPD SCHOOL SAFETY DIVISION
or his SUCCESSOR, in his official capacity, NEW
EXPLORATIONS IN SCIENCE TECHNOLOGY AND
MATH (a/k/a NEST), DR. OLGA LIVANIS, in her
individual and official capacity, BRENDAN ALFIERI,
in his individual and official capacity, JOSE-MARTINEZ-
ELIAS, in his individual and official capacity and
SCHOOL SAFETY AGENTS "JANE DOE 1," "JANE
DOE 2," in their individual and official capacities,

FILED

JUL 15 2011

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiffs, self-represented:
Devorah Hirsch
40 Exchange Place, Suite 1800
New York, NY 10005
646-464-2059

For defendants:
Suzanne K. Colt, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0611

By notice of motion dated December 6, 2010, plaintiffs move pursuant to CPLR 3215(a) for an order granting them a default judgment against defendants Martinez-Elias, Livanis, Alfieri, Secreto, New Explorations in Science Technology and Math (NEST), and School Safety Agents

Jane Does 1 and 2, and scheduling an inquest. Defendants oppose the motion and, by notice of cross motion dated January 20, 2011, move pursuant to CPLR 2004 for an order extending defendants' time to appear or compelling plaintiffs to accept late service of an answer on behalf of Martinez-Elias, Livanis, Alfieri, and Secreto, and pursuant to CPLR 3211 dismissing the complaint against Secreto.

I. BACKGROUND

By summons and verified complaint dated March 16, 2009, plaintiffs commenced the instant action. (*Affidavit of Devorah Hirsch, dated Dec. 6, 2010 [Hirsch Affid.], Exh. B*). As pertinent here, plaintiffs' affidavits of service of the summons and complaint reflect the following:

- (1) On March 25, 2010, the pleadings were personally served on Alfieri and Martinez-Elias;
- (2) On April 14, 2010, the pleadings were personally served on Livanis; and
- (3) On April 20, 2010, the pleadings were served on Secreto by personal service upon the Corporation Counsel.

(*Id.*, Exh. A). There is no proof of service upon NEST or the school safety agents.

On or about April 9, 2010, Corporation Counsel served an answer on behalf of defendants City of New York, The Board/Department of Education of the City of New York, and New York City Police Commissioner Raymond W. Kelly. (*Id.*, Exh. C).

On or about July 1, 2010, Corporation Counsel served an amended answer on behalf of the same defendants as well as Martinez-Elias. (*Id.*, Exh. D).

On or about July 13, 2010, plaintiffs served and filed an amended verified complaint. (*Id.*, Exh. E).

On or about November 10, 2010, Corporation Counsel served a second amended answer

on behalf of the same defendants as well as Livanis and Alfieri. (*Id.*, Exh. F). By notice dated and served on November 16, 2010, plaintiffs rejected the second amended answer on the ground that Livanis and Alfieri had failed to interpose a timely answer. (*Id.*).

II. PLAINTIFFS' MOTION

Pursuant to CPLR 3215, a default judgment may be entered upon a party's failure to answer or appear timely. The moving party must file proof of service of the summons and complaint along with proof of the facts constituting the claim and default. (CPLR 3215[f]).

Pursuant to CPLR 306(b):

[w]henver service is made pursuant to this article by delivery of the summons to an individual, proof of service shall also include, in addition to any other requirement, a description of the person to whom it was so delivered, including, but not limited to, sex, color of skin, hair color, approximate age, approximate weight and height, and other identifying features.

Here, the affidavits of service relating to service on Livanis, Alfieri, and Martinez-Elias, in which it is alleged that they were personally served with the pleadings, lack a description of the person allegedly served. Absent such information, the affidavits of service do not constitute *prima facie* proof of service. (*De Zego v Donald F. Bruhm, M.D., P.C.*, 67 NY2d 875 [1986] [plaintiffs failed to meet burden of proving proper service as affidavits of service did not contain required factual and descriptive detail to establish that pleadings were served personally on defendant]).

The affidavit of service relating to Secreto also contains no description of the person allegedly served. Moreover, while a party may serve a corporation or governmental subdivision by serving the Corporation Counsel with the pleadings (CPLR 311[a][2]), service on a person must be made in compliance with CPLR 308, which requires that, as pertinent here, service be

made by delivery to a personal of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and subsequent mailing. Absent any indication that Secreto's actual place of business is the office of the Corporation Counsel or that he was personally served at that location, plaintiffs have failed to establish that he was properly served.

Plaintiffs also fail to submit proof of service of their pleadings on NEST or the school safety agents.

II. DEFENDANTS' MOTION

A. Extend time or compel answer

Pursuant to CPLR 2004, the court may extend the time for doing any act upon good cause shown, and pursuant to CPLR 3012(d), time to answer a pleading may be extended or a party may be compelled to accept an untimely answer upon a showing of a reasonable excuse for the delay or default.

Here, defendants maintain that their delay in serving an answer on behalf of Martinez-Elias, Livanis, Secreto and Alfieri resulted from the statutory requirement that City defend and indemnify employees sued for actions undertaken during the course of their employment, which may occur only after the employee requests legal representation from City and City investigates the incident to determine whether it must represent the employee. Defendants also observe that the action has recently been commenced and assert that plaintiffs are not prejudiced by the late answer. (Affirmation of Colin Marville, ACC, dated Jan. 20, 2011 [Marville Aff.]).

Plaintiffs argue that defendants' motion is untimely as it was not made before the expiration of their time to answer and as they submitted no affidavit of merit. (Affidavit in

Opposition of Devorah Hirsch, dated Apr. 14, 2011 [Hirsch Affid.]).

City's investigation into whether it must defend an employee is a reasonable excuse for a delay in answering on behalf of the employee (*Harris v City of New York*, 30 AD3d 461 [2d Dept 2006]; *Silverio v City of New York*, 266 AD2d 129 [1st Dept 1999]), and no affidavit of merit is required where a default judgment or order has not yet been entered (*Arrington v Bronx Jean Co., Inc.*, 76 AD3d 461 [1st Dept 2010]; *Lamar v City of New York*, 68 AD3d 449 [1st Dept 2009]). Moreover, a motion pursuant to CPLR 3012(d) need not be made before the expiration of the time to serve an answer. (See eg *Planck v SUNY Bd. of Trustees*, 18 AD3d 988 [3d Dept 2005], *lv denied* 5 NY3d 844 [defendant served answer late and then moved for permission to serve late answer; court did not abuse discretion in denying default judgment motion and compelling plaintiff to accept late answer]).

Defendants have thus established entitlement to an order compelling plaintiffs to accept their late answer.

B. Dismiss

Defendants contend that as Secreto's actual place of business is not Corporation Counsel's office, plaintiffs did not properly serve him there and, as more than 120 days have elapsed since plaintiffs filed their complaint, the complaint must be dismissed against him. (Marville Aff.).

Plaintiffs argue that defendants waived the defense of lack of personal jurisdiction by failing to interpose the defense in their original answer, and that service on Secreto by serving Corporation Counsel was proper as he is a City employee. (Hirsch Affid.).

Pursuant to CPLR 306-b, service of a summons and complaint must be made within 120

days of its filing, and if not made timely, the court may dismiss the action without prejudice or extend the time for service upon good cause shown or in the interest of justice.

As plaintiffs did not personally serve Secreto as required by CPLR 308 and fail to submit any authority for the proposition that service on a City employee may be made by service upon Corporation Counsel, and as more than 120 days have elapsed since they filed their summons and complaint, plaintiffs have not demonstrated that they properly and timely served Secreto, nor any good cause for or that the interest of justice warrants an extension of time here.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for a default judgment is denied in its entirety; it is further

ORDERED, that defendants' cross motion for an order compelling plaintiffs to accept their answer is granted and defendants are directed to serve their answer on plaintiffs within 20 days of the date of this order; and it is further

ORDERED, that defendants' cross motion for an order dismissing the action against defendant James Secreto is granted, and the complaint is hereby severed and dismissed as against defendant Secreto, and the Clerk is directed to enter judgment in favor of said defendant.

ENTER:

3D

Barbara Jaffe, JSC

BARBARA JAFFE

FILED

DATED: July 12, 2011
New York, New York

JUL 15 2011

COUNTY CLERK'S OFFICE