

Ledesma v Good Luck Realty Corp.

2012 NY Slip Op 30360(U)

February 15, 2012

Supreme Court, New York County

Docket Number: 107578/2010

Judge: Judith J. Gische

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

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

PART 10

Index Number : 107578/2010
LEDESMA, JORGE P.
vs
GOOD LUCK REALTY
Sequence Number : 001
DEFAULT JUDGMENT

INDEX NO: _____
MOTION DATE: _____
MOTION/DEB. NO.: _____
MOTION CAL. NO.: _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits: ...
Answering Affidavits — Exhibits: _____
Replying Affidavits: _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

FEB 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/15/12

JUDITH J. GISCHE, J.S.C. *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 10**

JORGE P. LEDESMA, X

Plaintiff,

-against-

GOOD LUCK REALTY CORP., FEMME
FATALE INC. d/b/a COME,
K CONSTRUCTION COMPANY, INC., and
LIAM TREANOR CONSTRUCTION CORP. d/b/a
LT CONSTRUCTION,

Defendants.

GOOD LUCK REALTY CORP., X

Defendant/Thlrd-Party Plaintiff,

-against-

EMMA CLEARY, FREDERICK Y. LOH, and FEMME
FATALE, INC.,

Third-Party Defendants.

X

DECISION/ORDER
Index No. 107578/2010
Seq #: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

TP Index No:
590400/2011

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

Papers	Numbered
Good Luck n/m (3215) w/DK affirm, supp affirm, exhs	1,2

Hon. Gische, J.

Upon the foregoing papers, the Decision and Order of the Court is as follows:

This is an action by Plaintiff, JORGE LEDESMA ("Plaintiff"), against Defendant, GOOD LUCK REALTY CORP. ("Good Luck") for damages resulting from bodily injuries sustained from a fall on the premises known as 173 Mott Street, New York, New York. Good Luck has brought a third-party action against EMMA CLEARY ("Cleary"), FREDERICK Y. LOH

("Loh") and FEMME FATALE, INC. ("Femme Fatale"). Third-party plaintiff, Good Luck, now moves for a default judgment against third-party defendants, Cleary, Loh and Femme Fatale on Good Luck's claims for indemnification. The motion at bar has been submitted to this court unopposed, and consequently, it will be decided on default.

In support of Good Luck's motion for entry of a default judgment, Good Luck provides proof that all third-party defendants were properly served with the third party complaint. In his affirmation, Attorney Dennis Krollan states that Cleary was served pursuant to CPLR § 308 (2) when the process server delivered a true copy of the summons and verified complaint to the concierge/doormen at Cleary's residence, Vasco Narlier, on September 8, 2011. Service on Cleary was completed on September 8, 2011 when a true copy of the summons and verified complaint was mailed, in a post-paid wrapper, properly addressed to Cleary's residence. An affidavit of service was filed with the court on September 9, 2011.

Attorney Krollan further asserts that on September 8, 2011, Loh was also properly served pursuant to CPLR § 308 (2) when his process server delivered of a true copy of the summons and verified complaint to the concierge/doormen, Julio Medrano, at Loh's residence. Attorney Krollan states that service on Loh was completed on September 8, 2011 when a true copy of the summons and verified complaint was mailed, in a post-paid wrapper, properly addressed to Loh's residence. An affidavit of service was filed with the court on September 9, 2011.

Such service on Cleary and Loh comports with the requirements of CPLR § 308 (2) which provides in pertinent part as follows:

"Personal service upon a natural person shall be made by any of the following methods:

(2) ...by delivering the summons within the state to a person 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 by mailing the summons to the person to be served at his last known address...."

The affidavits of service for Cleary and Loh indicate that the summons and verified complaint were delivered to their respective doormen. "[I]n at least some circumstances, an apartment house doorman may be 'a person of suitable age and discretion at the actual... dwelling place' of a tenant in the apartment house to whom a summons may properly be delivered for the purposes of alternative service under CPLR § 308 (2). (F.I. DuPont, Glore Forgan & Co. v. Chen, 41 N.Y.2d 794 [1977]). If a process server is denied entry to the defendant's actual apartment by a doorman or another employee because the tenant is not home, the outer bounds of the actual dwelling place is extended from the residence to the location at which the process server's progress is hindered. (Id. At 797; see also Al Fayed v. Barak, 39 A.D.3d 371 (1st Dept. 2007)(holding that service of summons was proper where the process server left the papers with the building doorman after being denied access to the building and told that the tenant was not home), Board of Managers of Le Trianon Condominium v. 1439 Realty Corp., 186 A.D.2d 437 (1st Dept. 1992)).

The process server's affidavit for Cleary revealed that upon arrival, the doorman called up to Cleary's apartment and when he received no answer, he denied the server access to the building. The process server left the papers with the doorman. Additionally, the process server's affidavit for Loh states that Doorman Medrano denied the server entry to Loh's apartment because Loh was not available. Medrano then agreed to take the papers on behalf of Loh. Service upon Cleary and Loh is sufficient pursuant to CPLR § 308 (2).

Although Good Luck has established it properly served the summons and complaint on Cleary and Loh, Good Luck did not comply with additional notice requirements of CPLR § 3215(g)(3). CPLR § 3215(g)(3) requires that the party seeking a default judgment serve the defaulting party with additional notice at least twenty (20) days prior to the entry of a default judgment. (CPLR § 3215(g)(3)(i)). There is no proof of such additional notice.

Good Luck also seeks entry of a default judgment against Femme Fatale. Good Luck provides proof that Femme Fatale, a domestic corporation, was served through the Secretary of State pursuant to BCL § 306 on June 16, 2011. However, Good Luck failed to serve additional notice on Femme Fatale pursuant to CPLR § 3215(g)(4).

Even were the Court persuaded that this motion satisfies the additional notice requirements of CPLR § 3215, Good Luck has failed to establish the *prima facie* elements of its claims, which are for contractual indemnification. Although default in answering Plaintiff's complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom (Rokina Optical Co., Inc. v. Camera King, Inc., 63 N.Y.2d 728 [1st Dept 1984]), the party seeking a default judgment must still demonstrate that it has a *prima facie* cause of action (Gagen v. Kipany Productions Ltd., 289 A.D.2d 844 [3d Dept 2001]).

Since Good Luck seeks contractual indemnification against Femme Fatale, Loh, and Cleary, Good Luck must provide a copy of the Contract to establish the parties' rights and obligations thereunder (Moss v. McDonald's Corp., 34 A.D.3d 656 (2d Dept 2006)). Good Luck has not, however, provided a copy of the operative contract among the parties. Furthermore, Good Luck has provided an incomplete complaint. Good Luck failed to attach all pages in Amended Third-Party Complaint provided in Exhibit "B" of its motion for

default judgment, and said Complaint refers to exhibits not printed and attached in the motion. Thus, Good Luck has not established its *prima facie* case.

Therefore, Good Luck's motion for entry of a default judgment must be denied without prejudice to renew upon proper papers which shall, at a minimum, include a copy of the contract. Such motion to renew must be made no later than 90 days after this decision appears on SCROLL as having been entered. Failure to renew will be deemed abandonment of this claim and will result in the dismissal of this action.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Good Luck's motion for entry of a default judgment against third-party defendants, EMMA CLEARY, FREDERICK LOH, and FEMME FATALE, INC., is denied without prejudice to renew no later than 90 days after this decision appears on SCROLL as having been entered. Failure to renew will be deemed abandonment of this claim and will result in the dismissal of this action; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied; and it is further

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

Dated: New York, New York
February 15, 2012

So Ordered:

FILED

FEB 16 2012

NEW YORK
COUNTY CLERK'S OFFICE


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