

Boyarski v City of New York

2013 NY Slip Op 30168(U)

January 22, 2013

Supreme Court, New York County

Docket Number: 107598/2010

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 107598/2010

BOYARSKI, JOEL

vs

CITY OF NEW YORK

Sequence Number : 004

DEFAULT JUDGMENT CALIF 14

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

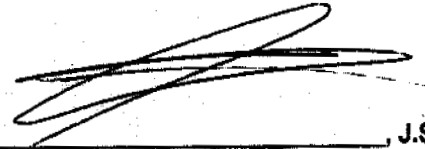
FILED

JAN 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1-22-13
JAN 22 2013



HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
JOEL BOYARSKI and ELEANOR BOYARSKI,

Plaintiffs,

-against-

CITY OF NEW YORK and CONSOLIDATED

DECISION/ORDER
Index No.: 107598/2010
Seq. No.: 004

EDISON COMPANY OF NEW YORK, INC.,
SKANSKA USA CIVIL, INC., individually and
doing business as S3 TUNNEL CONSTRUCTORS,
INC., J.F. SHEA CONSTRUCTION, INC.,
individually and doing business as S3 TUNNEL
CONSTRUCTORS, INC., SCHIAVONE
CONSTRUCTION CO., LLC, individually and
doing business as S3 TUNNEL CONSTRUCTORS,
INC., S3 TUNNEL CONSTRUCTORS, INC., and
URANOS CONSTRUCTION CORP.,

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

FILED
JAN 30 2013
NEW YORK
COUNTY CLERKS OFFICE

Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-3.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS..... 4-5.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiffs move for an Order pursuant to CPLR § 3215(a)(b), directing that a default judgment

be entered against defendant Uranos Construction Corp., or in the alternative, setting the instant matter down for an inquest in favor of plaintiffs, assessing damages in a sum certain, or, for a sum which can, by computation, be made certain, awarding costs, attorneys' fees and sanctions to plaintiff's attorneys. No opposition has been submitted.

After a review of the instant motion, all relevant statutes and caselaw, the Court grants the motion.

Factual and procedural background:

Plaintiff Joel Boyarski commenced instant action to recover damages for alleged serious injuries he sustained in a trip and fall on March 14, 2009, as a result of the negligence of defendant, Uranos Construction Corp., (hereinafter, "Uranos"). The summons and verified complaint were subsequently served on Uranos, and a copy of the accompanying affidavit of service is appended to plaintiff's moving papers as Exhibit "B."

A review of said affidavit of service reveals that on August 18, 2011, Paula Cole effected personal service on Donna Christie, a person of suitable age and discretion, at the Office of the Secretary of State in Albany, New York. To date, defendant Abraham Salifu of Uranos, has failed to serve an Answer or responsive pleading in response. A motion requesting that a default judgment be entered against Uranos, was served on all defendants on January 24, 2012, and subsequently filed with the court. On May 7, 2012, Hon. Barbara Jaffe rendered a written decision and order denying said motion, finding that plaintiffs failed to submit proof that they had also mailed an additional copy of said Summons and Complaint to Uranos in accordance with CPLR§3215(g)(4).

Now, plaintiffs annex to the instant motion as Exhibit "D," an affidavit of Kathy Rotunno, an employee of plaintiffs' counsel. In her affidavit, Ms. Rotunno avers that on November 29, 2011, she mailed, via certified return mail receipt requested and regular mail, a letter with the summons

[* 4]

and verified complaint to Uranos Construction Corp., at their last known address of 165 East 98th Street, Suite C, New York, New York, 10128. This mailing occurred at least twenty days prior to the entry of judgment. Additionally, annexed as Exhibit "E," is an affidavit of plaintiff Joel Boyarski, who essentially attests to the facts constituting his claim.

Also annexed to plaintiffs' motion is another affidavit of service indicating that on September 11, 2012, Kyle Warner served a copy of the instant motion on Uranos via Chad Matice, a person of suitable age and discretion, at the Office of the Secretary of State. This is accompanied by an affidavit of Kathleen Rotunno, who avers that on September 7, 2012, she served copies of the motion on the various defendants.

Plaintiffs assert that Uranos was properly served with the summons and complaint on August 18, 2011, within twenty days in accordance with CPLR§ 3012(a). Plaintiffs also assert that a search indicates that Uranos dissolved the corporation on October 26, 2011, more than three months after the service of the Summons and Complaint. Thus, its default is willful and deliberate, designed to prejudice and hamper plaintiffs ability to litigate the action expeditiously.

Conclusions of law:

CPLR§3215(a) provides that when a defendant has failed to appear, plead or proceed to trial of an action....., the plaintiff may seek a default judgment against him. If the plaintiff' claim is for a certain sum or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint or stated in the notice service pursuant to subdivision (b) of rule 305, plus costs and interest.....

It is well settled that "[o]n a motion for leave to enter a default judgment pursuant to CPLR

§3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (Atlantic Cas. Ins. Co. v. RJNJ Servs. Inc., 89 A.D.3d 649, 651 [2d Dept. 2011]). Moreover, a default in answering the complaint is deemed to be an admission of all factual statements contained in the complaint and all reasonable inferences that flow from them (see Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]).

In the case at bar, plaintiffs have provided an affidavit of plaintiff Joel Boyarski attesting to the facts constituting his claim and also due proof of service on defendant Uranos, accompanied with an affidavit of mailing. Moreover, this motion for entry of a default judgment is brought within one year of the default and also more than twenty days prior to the entry of judgment. Such service sufficiently complies with the additional notice requirements of CPLR§ 3215(g)(4)(i).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for an order granting a default judgment is granted against defendant Uranos Construction Corp., however, no sanctions will be granted and it is further

ORDERED that an inquest is directed at time of trial and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of the appropriate fees, if any, to place this action on the appropriate trial calendar for the assessment herein directed and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 22, 2012

JAN 22 2013

FILED

ENTER:

JAN 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT